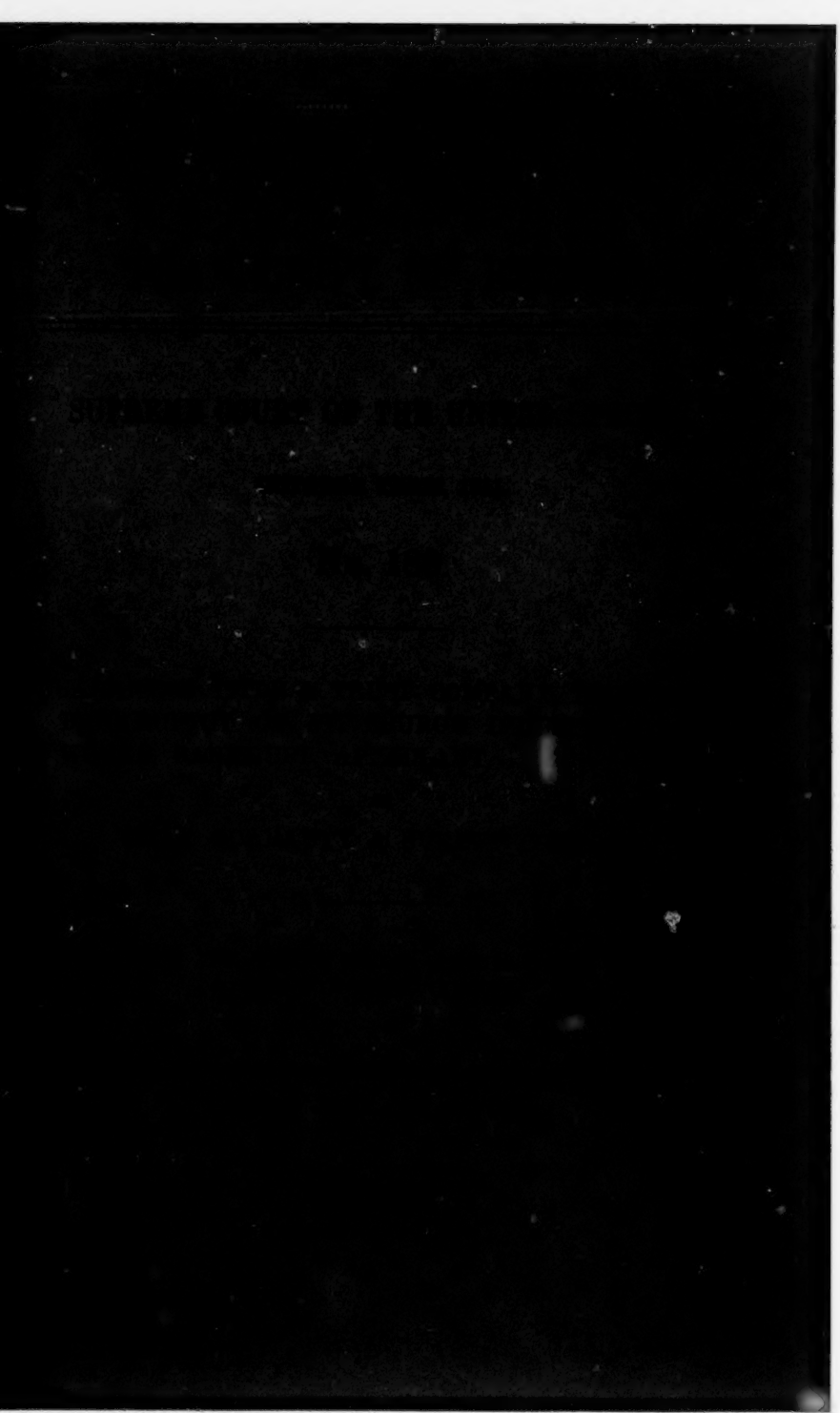

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 188.

GUARANTEE TITLE & TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF PITTSBURGH INDUSTRIAL IRON WORKS, BANKRUPT, APPELLANT,

vs.

TITLE GUARANTY & SURETY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 25, 1911.

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United States Circuit Court of Appeals for the Third Circuit, October Term, 1909.

No. 31.

TITLE GUARANTY AND SURETY COMPANY, Appellant,
vs.
ARANTEE TITLE AND TRUST COMPANY, Trustee in Bankruptcy of Pittsburg Industrial Iron Works, Bankrupt, Appellee.

the Honorable William R. Day, Justice of the Supreme Court f the United States:

The petition of the Guarantee Title and Trust Company, Trustee ankruptcy of Pittsburg Industrial Iron Works, bankrupt, Ap- ee in the above entitled case, respectfully represents:

First. That the above entitled case is pending in the Circuit Court Appeals for the Third Circuit, and that on November 29th, 1909, court filed its opinion sustaining the appeal, and on December 1909, entered its judgment and decree reversing the order of District Court for the Western District of Pennsylvania from ch said appeal was taken.

econd. That your petitioner files herewith a transcript of the rd in said case including all proceedings in the Circuit Court Appeals.

Third. That the amount in controversy in said case exceeds Two usand Dollars, exclusive of costs.

Fourth. That the determination of the questions involved in said order and decree is essential to a uniform construction of the Bankruptcy Act throughout the United es, for that, as appears from said record, said order and decree prise an adjudication of the following questions:

. Does the Bankruptcy Act in any way affect or limit the pro- ons of Sections 3466 and 3468 of the Revised Statutes of the ted States, or either of said sections?

. When the principal on a bond given to the United States, omes bankrupt, and the surety on such bond pays to the United es the money due thereon, shall said surety receive distribution n the bankrupt estate under Clause 5 of Section 64*b* of the kruptcy Act of 1898, or, on the contrary thereof, is such surety tled to priority over all other claims, under Sections 3466 and 8 of the Revised Statutes of the United States?

. Is such surety bound to prove its claim in bankruptcy within statutory period, or on the contrary thereof, is it exempt from limitation by subrogation to a sovereign prerogative by virtue he provisions of Section 3466 of the Revised Statutes?

. The surety in this case, appellant above named, having paid he United States the money due upon such a bond, after a de- lt judgment in a suit by the United States against the surety, such judgment a liquidation within the meaning of the ex-

ception to Section 57*n* of the Bankruptcy Act of 1898?

3 Fifth. That your petitioner conceives itself aggrieved by the decree and judgment so as aforesaid entered in said case by said Circuit Court of Appeals, and is desirous of appealing therefrom to the Supreme Court of the United States.

Therefore your petitioner prays your Honor as follows:

1. That a certificate be dule awarded to your petitioner in accordance with Section 25 of the Bankruptcy Act, certifying that the determination of the questions involved in said order, judgment and decree of the Circuit Court of Appeals for the Third Circuit, is essential to a uniform construction of the Bankruptcy Act throughout the United States.

2. That an appeal be allowed to your petitioner from said order, judgment and decree in order that the findings and conclusions of said Circuit Court of Appeals and the assignments of error to be filed by your petitioner may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

And your petitioner will ever pray.

GUARANTEE TITLE AND TRUST COMPANY,
Trustee in Bankruptcy of Pittsburg Industrial Iron Works, Bankrupt,
By Its Attorney, R. T. M. McCREADY.

DISTRICT OF COLUMBIA, *ss:*

R. T. M. McCready being first duly sworn deposes and says that he is the duly authorized agent in this behalf of the Guar-
3½ antee Title and Trust Company, trustee in Bankruptcy of Pittsburg Industrial Iron Works, and the averments contained in the foregoing petition are true and correct.

R. T. M. McCREADY.

Sworn to and subscribed to before me this 17th day of December, 1909.

[SEAL.] ALEXANDER H. GALT,
Notary Public, D. C.

4 And now to wit, December 18th, 1909, upon consideration of the foregoing petition and accompanying transcript of record, it is hereby certified that the determination of the questions involved in the order, judgment and decree entered by the Circuit Court of Appeals for the Third Circuit at Number 31 October Term 1909 of said court, in the case of Title Guaranty and Surety Company, Appellant, vs. Guarantee Title and Trust Company, Trustee in Bankruptcy of Pittsburg Indistrial Iron Works, Bankrupt, is essential to a uniform construction of the Bankruptcy Act throughout the United States, and it is hereby ordered that an appeal in said case be allowed as prayed for.

WILLIAM R. DAY,
Associate Justice U. S. Supreme Court.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1909.

No. 31.

TITLE GUARANTY & SURETY COMPANY, Appellant,

vs.

GUARANTEE TITLE & TRUST COMPANY, Trustee in Bankruptcy of Pittsburg Industrial Iron Works, Bankrupt, Appellee.

And now comes Guarantee Title & Trust Company, Trustee in Bankruptcy of Pittsburg Industrial Iron Works, Bankrupt, and says that in the opinion and order filed herein November 29th, 1909, in the decree entered December 1st, 1909, and in the findings of fact and conclusions of law filed, there is manifest error; and that the United States Circuit Court of Appeals for the Third Circuit erred in this, to-wit:

First. In holding and decreeing that the claim of the Title Guaranty & Surety Company is a valid claim within the provisions of Sections 3466 and 3468 of the Revised Statutes of the United States, standing alone.

Second. In holding that the provisions of the Bankruptcy Act of 1898 do not qualify or limit the rights of the United States or a paying surety otherwise entitled under Sections 3466 and 3468 of the Revised Statutes.

Third. In holding that the United States is not included under the term "person" as used in Section 65-*b*5 of the Bankruptcy Act of 1898.

6 Fourth. In holding that the Title Guaranty & Surety Company, having been surety on a bond given by said bankrupt to the United States, and having paid to the United States the money due upon such bond, it should not receive distribution under clause 5 of Section 64-*b* of the Bankruptcy Act of 1898, and on the contrary thereof, is entitled to priority over all other claims under Sections 3466 and 3468 of the Revised Statutes.

Fifth. In holding that the limiatation for proof of claims against a bankrupt estate provided by Section 57-*n* of the Bankruptcy Act of 1898 does not apply to the claim of the Title Guaranty & Surety Company in this case.

Sixth. In holding and decreeing in its opinion filed as follows:

"It follows therefore that the claim of the surety must be awarded priority in the distribution of the fund in the hands of the trustee."

Seventh. In making and entering the followjng decree:

"This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the order of the said District Court in this cause be and the same is hereby reversed with costs.

And it is further ordered that this cause be remanded to
7 the said District Court with directions that the claim of the surety must be awarded priority in the distribution of the funds in the hands of the trustee."

Wherefore said Guarantee Title & Trust Company, Trustee in Bankruptcy of Pittsburg Industrial Iron Works, Bankrupt, appeals to the Supreme Court of the United States and prays that said judgment and decree of said Circuit Court of Appeals for the Third Circuit may be reversed in all things, and that a decree be made affirming the order of said District Court in this cause.

GUARANTEE TITLE AND TRUST COMPANY,
Trustee in Bankruptcy of Pittsburg Industrial Iron Works, Bankrupt,
By Its Attorney, R. T. M. McCREADY.

Notice of the foregoing assignments of error and of the allowance of an appeal to the Supreme Court of the United States, with a copy of said assignments of error, served on us December 18, 1909.

WALTER LYON,
JOHN P. HUNTER,
GEORGE J. SHAFFER,
Attorneys for Title Guaranty & Surety Company, Appellee.

(Indorsement:) No. 31. October Term, 1909. Title Guaranty & Surety Co., Appellant, vs. Guarantee Title & Trust Co., Trustee in Bankruptcy of Pittsburg Industrial Iron Works, Bankrupt, Appellee. Assignments of error and proof of service. R. T. M. McCready, Attorney at Law, Frick Building, Pittsburgh, Pa. Filed December 30, 1909.

8 In the District Court of the United States for the Western District of Pennsylvania.

Case No. 3781. In Bankruptcy.

THE HAYWARD COMPANY et al.
vs.
PITTSBURGH INDUSTRIAL IRON WORKS, ALLEGHENY.

(*Docket Entries.*)

Attorneys: R. T. M. McCready, Pittsburgh, Pa.
Referee: William R. Blair, Pittsburgh, Pa.

November 9, 1907.—Creditors' petition in duplicate filed at 10 A. M.

November 9, 1907.—Subpœna awarded: returnable the 15th instant.

November 9, 1907.—Subpœna and copy of creditors' petition issued to marshal.

November 14, 1907.—On petition for restraining order and for appointment of Receiver filed, order made appointing J. M. Stoner, Jr., of Pittsburgh, as Receiver; said receiver to give bond in the sum of $50,000.00.

November 14, 1907.—Restraining order granted against Juniata Furnace & Foundry Co., Charles O. Sprague, George Hartman, L. C. Elliott, C. H. Miller Hardware Co., Wells Bros. Co. & Graham Nut Co., returnable the 25th instant.

November 15, 1907.—Said subpœna with Marshal's return thereon showing service of same on C. F. Dickinson, President of said Company, filed.

November 15, 1907.—Bond of receiver filed and approved.

November 15, 1907.—On petition filed, order made authorizing receiver to deliver to Pittsburgh Provision & Packing Co., four tanks upon the payment of the contract price of $1,200.00; and authorizing Receiver to expend not over $100 to complete said tanks.

November 21, 1907.—Said debtor adjudged bankrupt and matter referred to William R. Blair, referee at Pittsburgh, for further proceedings.

November 21, 1907.—Copies of order of reference issued.

November 21, 1907.—On petition of said receiver filed, restraining order granted against American Car and Foundry Company, returnable 28th instant.

9 December 9, 1907.—On petition of Joseph W. Cottrell filed, rule granted on said receiver to show cause why certain lumber should not be delivered to said petitioner, returnable 20th inst.

December 20, 1907.—Answer of said receiver to said rule filed.

December 26, 1907.—On petition of the First National Bank of Huntington, Penna., filed, rule granted on said Receiver to show cause why he should not turn over to said petitioner proceeds of a certain contract, returnable 15th proximo.

January 6, 1908.—Order made appointing William T. Lindsey as Special Master to take testimony of the parties thereto and make report of same to the Court.

January 6, 1908.—Answer of said receiver to petition of First National Bank of Huntington filed.

January 14, 1908.—Bankrupt's schedules in triplicate filed and duplicate mailed referee.

January 14, 1908.—Argument sur said rule by R. L. Smith, Esq., attorney for rule, and R. T. M. McCready, Esq., contra. C. A. V.

January 16, 1908.—Testimony taken before said master sur said rule filed.

January 31, 1908.—Opinion of Court handed down making said rule absolute and directing receiver to deliver to petitioner all of said material now in his hands.

March 20, 1908.—Petition of United States Fidelity & Guaranty Co., praying that order made on December 13, 1907, authorizing sale of certain material, be revoked and asking for an order directing said receiver or trustee to turn same over to said petitioner filed.

March 20, 1908.—Answer of said receiver to said petition filed.

March 20, 1908.—Order made revoking order of December 13,

1907, so far as the same may authorize the sale of any material in connection with the contract of said bankrupt to furnish bear trap gates for the United States Government, directing J. M. Stoner receiver, to deliver material in connection with said contract to said petitioner to complete said contract, to furnish the iron and steel for said gates and to sublet the same to N. D. Yant & Co., for $3,800.00 or to such other concern and for such price as said receiver may approve upon receipt of sufficient bond from such *such* sub-contractor, and directing said petitioner to account to said receiver for all moneys received on account of said contract in excess of the sum so expended as provided by contract for completition of same; the rights and preferences and liens, if any, of said petitioner by reason of its liability as surety to be determined upon distribution.

April 4, 1908.—Petition of W. H. Kilgour, a stockholder of the Huntington Silk Company, for leave to remove an engine belonging to said petitioner from the premises of the Pittsburgh Industrial Iron Works filed.

April 4, 1908.—Rule granted to show cause why said petition should not be granted, returnable 10th inst.

April 7, 1908.—Proof of service of rule of 4th inst., on attorney for receiver, filed.

April 9, 1908.—Answer of said receiver to said petition filed.

May 7, 1908.—Petition of receiver for injunction filed.

May 7, 1908.—Restraining order granted against G. M. McDonald of Reynoldsville, returnable 15th inst.

November 2, 1908.—Account of receiver presented.

November 2, 1908.—Order made that same be filed, and confirmed nisi, 10 days' written notice to be given trustee, to become absolute upon expiration of said term unless exceptions are filed thereto.

November 11, 1908.—Exceptions to receivers' account filed.

December 29, 1908.—Order made that notice be given to creditors of receiver's account, same to be confirmed absolutely on January 16 1909, unless exceptions thereto are filed.

January 20, 1909.—Proof of mailing notices filed.

January 20, 1909.—Order made confirming said receiver's account absolutely.

March 25, 1909.—Certified question before referee as to claim of Title Guaranty & Surety Co.; Report and Opinion of referee disallowing same, proof of debt, order of distribution, petition of claimant and rule; exceptions to decree, petition for review and proof of debt of preferred claim filed.

May 1, 1909.—Argued C. A. V.

May 29, 1909.—Order made confirming report of referee.

June 8, 1909.—Petition of The Title Guaranty & Surety Co. for allowance of appeal filed.

June 8, 1909.—Order made allowing appeal to the U. S. Circuit Court of Appeals for the Third Circuit.

June 8, 1909.—Assignments of error filed.

June 8, 1909.—Bond of said Title Guaranty & Surety Co. filed and approved.

June 24, 1909.—Citation issued, returnable 24th proximo.

July 16, 1909.—Petition of Washington Trust Co.: 1st, for leave to take possession of certain property subject to lien of a certain mortgage; 2nd, that it be permitted to bring suits for the enforcement of rights of bondholders, etc., filed.

July 16, 1909.—Order made granting said petition.

July 23, 1909.—Order made extending time for filing tran-
11 script in the U. S. Circuit Court of Appeals for a further period of thirty days.

July 23, 1909.—Stipulation of counsel for printing record filed.

Creditors' Petition.

To the Honorable Nathaniel Ewing, Judge of the District Court of the United States for the Western District of Pennsylvania:

The petition of The Hayward Company, a New York Corporation of New York City, and The Means Foundry & Construction Company, a West Virginia corporation, of Steubenville, Ohio, and The American Lumber & Manufacturing Company, a Pennsylvania corporation, of Pittsburgh, Pennsylvania, respectfully shows:

That the Pittsburgh Industrial Iron Works, a corporation incorporated and doing business under the laws of the State of Pennsylvania, and having its principal office in the city of Pittsburgh, in the county of Allegheny, Western District of Pennsylvania, has for the greater portion of six months next preceding the date of filing this petition, had its principal place of business at the corner of Ninth street and Penn Avenue, in the city of Pittsburgh, in the county of Allegheny and State and District aforesaid, and owes debts to the amount of $1,000.00; its said actual and authorized business being the manufacture of iron and steel products.

That your petitioners are creditors of the said The Pittsbugh Industrial Iron Works, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500.00. That the nature and amount of your petitioners' claims are as follows: The Claim of said The Hayward Company consists of an open account for goods sold and delivered by said creditor to said bankrupt; upon which there is due and owing the sum of Three thousand six hundred nineteen and 47/100 ($3,619.47) Dollars.

The claim of said The Means Foundry & Machine Company consists of an open account for goods sold and delivered by said creditor to said bankrupt, upon which there is due and owing, the sum of Five hundred seventeen and 85/100 ($517.85) dollars. The claim of said The American Lumber Company consists of three promissory notes heretofore executed and delivered for value by said bankrupt to said The American Lumber Company in the sums of $303, $450, and $200, respectively, making in all the sum of Nine hundred fifty-three ($953) dollars, the whole of which —

And your petitioners further represent that said The Pittsburgh Industrial Iron Works is insolvent, and that within four months next preceding the date of this petition the said The Pittsburgh
12 Industrial Iron Works committed an act of bankruptcy, in that it did heretofore, to-wit, on the 7th day of November,

1907, suffer and permit while insolvent a creditor to obtain a preference through legal proceedings, and did not at least five days before a sale of the property affected by such preference, vacate or discharge such preference, to-wit: said bankrupt did on said seventh day of November, 1907, suffer and permit the Reynoldsville Hardware Company to sell upon a writ of execution duly issued according to law in a legal proceeding in the County of Jefferson, State of Pennsylvania, certain property of said bankrupt, to-wit, certain office furniture; said writ having been duly issued upon a certain judgment duly entered in said county against said bankrupt and in favor of said Reynoldsville Hardware Company for the sum of One hundred Thirty-three and 09/100 ($133.09) dollars, within four months next preceding the date of this petition, to-wit, in the month of October, A. D. 1907.

Wherefore, your petitioners pray, That service of this petition, with a subpœna, may be made upon said Pittsburgh Industrial Iron Works as provided in the Acts of Congress relating to bankruptcy, and that he may be adjudged by the Court to be a bankrupt within the purview of said Acts.

(Sig.) AMERICAN LBR. & MFB. CO.,
By J. B. MONTGOMERY, *Sect.*
(Sig.) THE MEANS FOUNDRY AND MACHINE CO.,
By R. T. M. McCREADY, *Agent.*
(Sgd.) THE HAYWARD COMPANY,
By WALTER S. PIERCE, *Treasurer.*

[Corporate Seal.]

Witness:
(Sgd.) J. H. HAYWARD.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

J. B. Montgomery, Secretary of American Lumber & Manufacturing Company; J. H. Hayward, duly authorized agent of the Hayward Company, and R. T. M. McCready, as agent of the Means Foundry & Machine Company, said companies being the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

(Sgd.) J. B. MONTGOMERY.
J. H. HAYWARD,
R. T. M. McCREADY.

13 Sworn and subscribed before me this 8th day of November, 1907.

[N. P. SEAL.] I. L. GIFFEN,
Notary Public.

My appointment expires next session of Senate.

Endorsed as follows: Docket 8. Case No. 3781. Page —. In ankruptcy. United States District Court, Western District of ennsylvania. In the matter of The Pittsburgh Industrial Iron 'ks. Against whom a petition for Adjudication of Bankruptcy was ed. Creditor's Petition. Filed this 9th day of November, A. D. 907, at 10 o'clock A. M. (Sgd.) Wm. L. Lindsey, Clerk of said . S. Di[illegible]t Court. R. T. M. McCready, Attorney at Law, Frick ldg., Pittsburgh, Pa.

(*Order Appointing Receiver.*)

the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of THE PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

At the City of Pittsburgh, in said District, this 14th day of Noember, 1907, Western District of Pennsylvania, *ss.* R. T. M. Mceady, attorney for the petitioning creditors at the above number bankruptcy, moves the Court for the appointment of a Receiver the Pittsburgh Industrial Iron Works, Bankrupt, according to e prayer of petition filed by The Hayward Co., one of the creditors.

(Sig.) R. T. M. McCREADY,
Attorney for The Hayward Co.

And now, this 14th day of November, 1907, on motion of said orney, it appearing to the Court that the appointment of a Reiver is absolutely necessary for the preservation of the bankrupt ate, J. M. Stoner, Jr., of Pittsburgh, Pa., is hereby appointed eiver of the estate of said The Pittsburgh Industrial Iron Works take charge of the property of the bankrupt pending the further position of said bankruptcy proceeding. Bond in the sum of ty Thousand Dollars to be given by said Receiver, with approved urity.

PER CURIAM.

Endorsed as follows: No. 3781. In Bankruptcy. United States District Court, Western District of Pennsylvania. In matter of The Pittsburgh Industrial Iron Works, Bankrupt. der of Court Appointing Receiver. Filed Nov. 14, 1907.

(*Bond of Receiver.*)

In the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In re The Pittsburg Lndustrial Iron Works.

Know all men by these presents, That we, J. M. Stoner, Jr., of Pittsburgh, Pennsylvania, and The Franklin Savings and Trust Company of Pittsburgh, are held and firmly bound unto the United States of America, in the sum of fifty thousand dollars ($50,000), for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, and each of them, firmly by these presents.

Witness our hands and seals, duly attested, this 15th day of November, 1907.

Whereas, the above bounden J. M. Stoner, Jr., has been appointed receiver of The Pittsburgh Industrial Iron Works, bankrupt, at No. 3781, In Bankruptcy, in the District Court of the United States, for the Western District of Pennsylvania, and his order of appointment has directed him to give bond as such receiver in the sum of fifty thousand dollars ($50,000),

Now, therefore, the condition of this obligation is such, that if he, the above bounden J. M. Stoner, Jr., shall and will, truly and faithfully perform his duties as such receiver, according to law, and make a full, just and true account and settlement according to law for all moneys and property which may come into his hands as such receiver, then this obligation to be void, otherwise to remain in full force and virtue.

[SEAL.]
(Sig.) J. M. STONER,
THE FRANKLIN SAVINGS & TRUST CO. OF PITTSBURG,
(Sig.) F. J. KRESS, *Vice Pres.*
[CORPORATE SEAL.]

Attest:
(Sig.) J. S. BECKWITH.

15 State of Pennsylvania,
County of Allegheny, ss:

F. J. Kress, being first duly sworn, deposes and says that he is Vice President of The Franklin Savings and Trust Company, surety on the within bond; that he is duly authorized to execute bonds and other obligations under the seal of said corporation; that the within bond was executed by him on behalf of said The Franklin Savings and Trust Company by special authority of the board of directors of said company, the seal affixed to said bond being the common

rporate seal of said company which was affixed to said bond in ecution thereof by this deponent; and that the name of this de- nent is in his own proper handwriting and was affixed to said bond attestation of the execution thereof by this deponent as and for e act and deed of said The Franklin Savings and Trust Company is fifteenth day of November, 1907.

(Sig.) F. J. KRESS.

Sworn to and subscribed before me this 15th day of November, 07.

[N. P. SEAL.] AGNES C. WAY,
Notary Public.

My commission expires January 16, 1909.

Endorsed as follows: No. 3781. In Bankruptcy. In re The ittsburg Industrial Iron Works. Bond of Receiver. And now, -wit, November 15, 1907, the within bond of J. M. Stoner, Jr., as eceiver of The Pittsburg Industrial Iron Works, bankrupt, with he Franklin Savings and Trust Co. of Pittsburgh as surety, is here- y approved and ordered to be filed. (Sgd.) R. W. Archbald, U. S. ist. Judge. M. D. Pa. R. T. M. McCready, Attorney at Law, rick Bldg., Pittsburgh, Pa. Filed Nov. 15, 1907.

(*Order of Adjudication.*)

Adjudication of Bankruptcy.

n the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURG INDUSTRIAL IRON WORKS, Bankrupt.

At Pittsburg, in said District, on the 21st day of November, A. D. 1907, before the Honorable R. W. Archbald, Judge of 16 said Court in Bankruptcy, the petition of The Hayward Company et al. that Pittsburgh Industrial Iron Works be adjudged a Bankrupt, with the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said Pittsburgh Industrial Iron Works is hereby declared and adjudged bankrupt accordingly.

By the Court:

(Sig.) R. W. ARCHBALD,
Judge U. S. District Court, Middle Dist. of Penna.

Specially Designated.

Endorsed as follows: No. 3781. In Bankruptcy. United States District Court, Western District of Pennsylvania. In the matter of Pittsburgh Industrial Iron Works, Bankrupt. Adjudication. Filed Nov. 21, 1907.

(*Order of Reference.*)

In the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

At the City of Pittsburgh, in said District, this 21st day of November, A. D. 1907.

Whereas, Pittsburgh Industrial Iron Works, in the County of Allegheny and District aforesaid, on the 21st day of November, A. D. 1907, was duly adjudged a Bankrupt, upon a Petition filed in this Court against it, on the 9th day of November, A. D. 1907, according to the provisions of the Acts of Congress relating to Bankruptcy.

It is thereupon ordered, that said matter be referred to W. R. Blair, Esq., one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said acts; and that the said bankrupt shall attend before said Referee on the 29th day of November, 1907, at Pittsburgh, and thenceforth shall submit to such orders as may be made by said Referee, or by this Court, relating to said Bankruptcy.

By the Court:

(S'g'd) R. W. ARCHBALD,
Judge U. S. District Court, Dist. of —.

17 Endorsed as follows: No. 3781. In Bankruptcy. United States District Court, Western District of Pennsylvania. In the Matter of Pittsburgh Industrial Iron Works, Bankrupt. Order of Reference. Filed Nov. 21, 1907.

(*Appointment of Trustee by Referee.*)

In the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURG INDUSTRIAL IRON WORKS, Bankrupt.

At Pittsburgh, in said District, on the 11th day of July, A. D. 1908, Before William R. Blair, Referee in Bankruptcy.

And now to wit, July 11, 1908, it appearing that the creditors whose claims had been allowed, and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate at a meeting of creditors held for the purpose, I do hereby appoint The Guarantee Title & Trust Co. of Pittsburgh, in the County of Allegheny and State of Pennsylvania, as trustee of the same.

(S'g'd) WILLIAM R. BLAIR,
Referee in Bankruptcy.

Endorsed as follows: No. 3781. In the District Court of the United States, Western District of Pennsylvania. In Bankruptcy. In the matter of Pittsburgh Industrial Iron Works, Bankrupt. Appointment of Trustee by Referee. Filed July 11, 1908. William R. Blair, Referee in Bankruptcy.

(*Bond of Trustee.*)

In the District Court of the United States, Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In re Estate of PITTSBURGH INDUSTRIAL IRON WORKS.

Know all men by these presents, That we, Guarantee Title and Trust Company of Pittsburgh, County of Allegheny, as
18 principal, and the Commonwealth Trust Company, of the same place, as surety, are held and firmly bound unto the United States of America, in the sum of Ten Thousand ($10,000) Dollars, in lawful money of the United States, to be paid to said United States, for which payment well and truly made, we bind ourselves, our successors, and assigns, jointly and severally firmly by these presents.

Signed and sealed this thirteenth day of July, A. D. 1908.

The condition of this obligation is such, That whereas the above named Guarantee Title and Trust Company was on the eleventh day of July A. D. 1908, appointed Trustee in the case pending in bankruptcy in said Court, wherein the Pittsburgh Industrial Iron Works is the bankrupt, and it, the said Guarantee Title and Trust Company, has accepted said trust with all the duties and obligations pertaining thereunto.

Now, therefore, if the said Guarantee Title and Trust Company, Trustee as aforesaid, shall obey such orders as the Court may make in relation to said trust, and shall faithfully and truly account for all moneys, assets and effects of the estate of said bankrupt which shall come into its hands and possession, and shall in all respects faithfully perform all its official duties as said Trustee, then this obligation to be void, otherwise to remain in full force and virtue.

GUARANTEE TITLE & TRUST COMPANY,

(Signed) By J. R. PAULL, *President.*

[CORPORATE SEAL.]

Attest:

(Signed) ALEX. DUNBAR, *Secretary.*

COMMONWEALTH TRUST COMPANY,

(Signed) By JNO. W. HERRON, *President.*

[CORPORATE SEAL.]

Attest:

(Signed) GEO. D. EDWARD, *Secretary.*

COUNTY OF ALLEGHENY,
State of Pennsylvania, ss:

On the 13th day of July A. D. 1908, before me, a Notary Public, in and for said County and State, personally appeared Geo. D. Edward who being duly sworn according to law, says that we was personally present at the execution of the foregoing Indenture,
19 and saw the common or corporate seal of the said Corporation duly affixed thereto, and that the seal so affixed thereto is the common or corporate seal of the said Corporation; that the foregoing Indenture was duly sealed and delivered by Jno. W. Herron of the said Corporation, as and for the act and deed of the said Corporation, for the uses and purposes therein mentioned, and that the name of this deponent as Secretary and of Jno. W. Herron as President of said Corporation, subscribed to the foregoing Indenture in attestation of its due execution and delivery are of their and each of their respective handwritings.

(Sgd.) GEO. W. EDWARD.

Sworn and subscribed to this 13th day of July, A. D. 1908.

(Sgd.) JOHN P. GETTMAN,
[N. P. SEAL.] *Notary Public.*

My commission expires April 7, 1909.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURGH INDUSTRIAL IRON WORKS.

At a Court of Bankruptcy, Held in and for the Western District of Pennsylvania, at Pittsburgh, this 13th Day of July, A. D. 1908, Before William R. Blair, Referee in Bankruptcy, in the District Court of the United States for said District.

It appearing to the Court that Guarantee Title & Trust Company, of Pittsburgh in said District, has been duly appointed Trustee of the estate of the above named bankrupt, and has given a bond with surety for the faithful performance of its official duties, in the amount fixed by the creditors, to wit, in the sum of Ten thousand ($10,000) Dollars, it is ordered that the said bond be, and the same is hereby approved.

(Sgd.) WILLIAM R. BLAIR,
Referee in Bankruptcy.

(Endorsed as follows:) No. 3781. In Bankruptcy. United States District Court Western District of Pennsylvania. In Re Estate of Pittsburgh Industrial Iron Works. Bond of Trustee. Filed July 13, 1908. William R. Blair, Referee in Bankruptcy.

20 *Order of Distribution.*

In the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

And now to wit, December 26th, 1908, a meeting of creditors having been this day held, after due notice, to consider and pass upon the account of the Trustee, and to declare and fix the time of payment of a dividend, now upon due consideration it is ordered, adjudged and decreed as follows, to wit:

First. That the account of the Trustee no exceptions being filed thereto is hereby confirmed.

Second. The claims for wages set forth in the Schedule of Distribution hereto attached are allowed in the amounts set forth in said Schedule as entitled to priority under the provisions of the Bankruptcy Law.

Third. The following rent claims are allowed in the following amounts as entitled to priority under the provisions of the Bankruptcy Law, to wit: Westinghouse Air Brake Company, $131.63, William D. Stevenson $30.00.

The total amount of debts duly proven and allowed and entitled to participate in dividends is the sum of $107,599.98, and the dividend rate is hereby fixed and declared to be none upon the claims duly proven and allowed, as aforesaid, and the Trustee is ordered to pay out the funds in — hands in accordance with the Schedule of Distribution hereto attached, and filed herewith, and that vouchers for said claims respectively be prepared for delivery by the Trustee to said claimants respectively on the 31st day of December, A. D. 1908.

(Sgd.) WILLIAM R. BLAIR,
Referee in Bankruptcy.

Schedule of Distribution.

Balance in the hands of the Trustee as shown by its account as confirmed		$9440.89
Deduct:		
To William R. Blair, Balance Referee's Costs..	204.62	
" William R. B-air, Referee's Commissions.	47.95	
" Ida A. Sturtevant, Typewriting.....	24.00	
" Weil & Thorpe, Attorneys' fees.....	100.00	
		376.57
Balance		$9064.32

21 Deduct:

To 80% of the following wages claims:

	Amount.	Dividend.	
C. E. Schreckingost.....	$4.76	$3.80	
* * * *	*	*	*
D. F. Turnbull.....	312.42	294.94	$4795.31
	$5994.37		$4269.01

(Endorsed as follows): No. 3781. In Bankruptcy. In the matter of Pittsburgh Industrial Iron Works, Bankrupt. Order of Distribution. Filed Dec. 26, 1908. William R. Blair, Referee in Bankruptcy. Filed in U. S. District Court March 25, 1909.

Petition for Reference of Title Guaranty & Surety Company.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

Petition.

To the Honorable William R. Blair, Referee in Bankruptcy:

The petition of The Title Guaranty & Surety Company respectfully represents:

That it is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its home office at Scranton, in the County of Lackawanna, in said Commonwealth, and carrying on a general surety business in the State of Pennsylvania and other states of the Union.

That on the eighth day of October, 1907, the said The Title Guaranty & Surety Company, at the request of the said Pittsburg Industrial Iron Works, issued its written guarantee of the proposal of the said Industrial Iron Works for furnishing all labor and material for constructing 150,000 gallon tank at Fort Dupont, Delaware, for Twelve Thousand Nine Hundred Ninety ($12,990) Dollars, which proposal was duly accepted. The said Pittsburgh Industrial Iron Works neglected and refused to comply with the terms of said proposal and the work was relet in due form for the sum of Eighteen Thousand ($18,000) Dollars.

22 In June 1908 suit was brought in the District Court of the United States for the District of Delaware, by the United States of America against The Title Guaranty & Surety Company, based upon said written guarantee, for the difference between the two sums, amounting to Five Thousand and Ten ($5,010) Dollars. Written notice of this suit was given by the said The Title Guaranty & Surety Company to the Guarantee Title & Trust Company, of Pittsburgh, the Trustee of the said Pittsburgh Industrial Iron Works

on the 22nd day of July, 1908, and the defense of the action tendered to the latter, which it declined to undertake. On the 30th day of November 1908 judgment was recovered by the United States of America in the said action for the sum of Five Thousand and Ten ($5,010) Dollars, bearing interest from the date of judgment and One Hundred Seventeen and 34/100 ($117.34) Dollars, costs of suit.

On the 11th day of December 1908 the said The Title Guaranty & Surety Company paid to the United States of America the amount of said judgment debt, interest and costs, amounting to the sum of Five Thousand One Hundred Thirty-five and 84/100 ($5,135.84) Dollars, to which should be added the cost of accompanying transcript of record, thirty-one and 55/100 ($31.55) Dollars, making in the aggregate the sum of Five Thousand One Hundred Sixty-seven and 39/100 ($5,167.39) Dollars.

Your petitioner further represents that, under the Acts of Congress, the debt so due the United States by the said bankrupt by reason of its failure to comply with the terms of its proposal and the re-letting of the said contract, became and was as a debt to the United States, a prior claim against the insufficient assets of the said bankrupt, and as such entitled to be first satisfied; and by reason of the fact that your petitioner as surety upon the bond of the said bankrupt having satisfied the debt due the United States so reduced to judgment as aforesaid, together with interest and costs thereon, your petitioner is subrogated to the rights of the United States, and under the Act of Congress is entitled to like priority for the recovery and receipt of the moneys of the estate and effects of the said bankrupt.

Your petitioner further says that it has prepared and filed a proper proof of this claim, setting forth that the same is a preferred claim and attaching thereto an exemplification of the record of the suit so brought by the United States against this Company in the District Court of the United States, for the District of Delaware, which was reduced to judgment and paid as aforesaid.

Wherefore, your petitioner prays that your Honorable Court will order and direct the Trustee in Bankruptcy to pay to your petitioner out of the funds in his hands before making any other distribution, the sum of five thousand one hundred sixty-seven and thirty-nine hundredths ($5,167.39) Dollars, with interest thereon from
23 December 11, 1908, so paid by your petitioner in satisfaction of the debt, interest and costs so due by the said bankrupt to the United States as aforesaid. And further, that all proceedings and payments be stayed in the meantime.

(Sgd.) THE TITLE GUARANTY & SURETY CO.,
By EDWARD BALL,
Resident Vice-President and General Agent.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

Before me, the undersigned authority, personally appeared Edward Ball, who, being duly sworn according to law, deposes and says

that he is the General Agent for The Title Guaranty & Surety Company, petitioner within named, and that the statements contained in the foregoing petition are true and correct to the best of his knowledge and belief.

(Sgd.) EDWARD BALL.

Sworn and subscribed before me this 29th day of December, A. D. 1908.

[N. P. SEAL.] (Sgd.) MARY SULLIVAN,
Notary Public.

My commission expires March 16th, 1911.

Order of Referee.

And now, to wit, December 29th, 1908, the within petition presented to the Referee, and on motion of Lyon, Hunter & Burke, Attorneys for Petitioner, a rule is granted on The Guarantee Title and Trust Company, Trustee in Bankruptcy, to show cause why the Title Guaranty & Surety Company, petitioner within named, should not be paid as a preferred claim the full amount of its claim, to wit, five thousand, one hundred sixty-seven and thirty-nine hundredths ($5,167.39) dollars, with interest thereon from December 11th, 1908. Returnable January 4th, 1909.

(Sgd.) WILLIAM R. BLAIR,
Referee in Bankruptcy.

(Endorsed as follows:) No. 3781. In Bankruptcy. In the matter of Pittsburgh Industrial Iron Works, Bankrupt. Petition. Filed Dec. 29, 1908. William R. Blair, Referee in Bankruptcy. Filed in U. S. Dist. Court March 25, 1909. Lyon, Hunter & Burke, Att'ys.

Proof of Preferred Claim of the Title Guaranty & Surety Company.

24 In the United States District Court for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

STATE OF PENNSYLVANIA,
County of Lackawanna, ss:

On this 24th day of December, in the year 1908, personally appeared before me the undersigned, a Notary Public in and for the said County and State, Grant L. Bell, of the City of Scranton, County of Lackawanna, State of Pennsylvania, and made oath and says: that he is the Treasurer of The Title Guaranty & Surety Company, a corporation incorporated by and under the laws of the Commonwealth of Pennsylvania, with its Home Office at Scranton, in the said County of Lackawanna and State of Pennsylvania and carrying on business in the State of Pennsylvania and other States of the United States, and that he is duly authorized to make this proof, and says that the said Pittsburgh Industrial Iron Works, the corporation

against whom the petition for adjudication of bankruptcy has been filed, is justly and truly indebted to the said The Title Guaranty & Surety Company in the sum of Fifty-one hundred Sixty-seven & 39/100 ($5,167.39) Dollars; that the consideration of said debt is as follows, to wit:

On the 8th day of October, 1907, the said The Title Guaranty & Surety Company, at the request of the said Pittsburgh Industrial Iron Works, issued its written guarantee of the proposal of the latter for furnishing all labor and material for constructing 150,000 gallon tank at Fort Dupont, Delaware, for Twelve Thousand Nine Hundred and Ninety ($12,990) Dollars, which proposal was duly accepted. The said Pittsburgh Industrial Iron Works neglected and refused to comply with the terms of said proposal and the work was relet in due form for the sum of Eighteen Thousand ($18,000) Dollars.

In June, 1908, suit was brought in the District Court of the United States for the District of Delaware by the United States of America against The Title Guaranty & Surety Company, based upon said written guarantee, for the difference between the two sums, amounting to Five Thousand and Ten ($5,010) Dollars. Written notice of this suit was given by the said The Title Guaranty & Surety
25 Company to the Guarantee Title & Trust Company, of Pittsburgh, the Trustee of the said Pittsburgh Industrial Iron Works in the 22nd day of July, 1908, and the defense of the action tendered to the latter, which it declined to undertake. On the 30th day of November, 1908, judgment was recovered by the United States of America in the said action for the sum of Five Thousand and Ten ($5,010) Dollars, bearing interest from the date of judgment and One Hundred Seventeen and 34/100 ($117.34) Dollars, costs of suit.

On the 11th day of December, 1908, the said The Title Guaranty & Surety Company paid to the United States of America the amount of said judgment debt, interest and costs, amounting to the sum of Five Thousand One Hundred and Thirty-five and 84/100 ($5,135.84) Dollars, to which should be added the cost of accompanying transcript of record, Thirty-one and 55/100 ($31.55) Dollars, making in the aggregate the sum of Five Thousand One Hundred Sixty-seven and 39/100 ($5,167.39) Dollars.

And deponent further says that said claim so paid by said The Title Guaranty & Surety Company was a debt due to the United States of America and is a preferred claim against the estate of the said Pittsburgh Industrial Iron Works and should be paid in full before claims of general creditors are paid.

Deponent further prays that the Trustee of the said Pittsburgh Industrial Iron Works be ordered to pay said claim in full, to wit, the sum of Five Thousand One Hundred Sixty-seven and 39/100 ($5,167.39) Dollars, with interest from December 11th, 1908.

(Sgd.) GRANT L. BELL.

Subscribed and sworn to before me this 24th day of December, 1908.

[N. P. SEAL.] (Sgd.) JUDSON E. HARNEY,
Notary Public.

My commission expires at the end of the next session of the Senate.

UNITED STATES OF AMERICA,
District of Delaware, ss:

At a stated term of the District Court of the United States
America, in and for the District of Delaware, begun and held
cording to law, at the City of Wilmington, in said District of D
ware, on the second Tuesday (being the ninth day) of June, A.
1908.

26 Present: The Honorable Edward G. Bradford, Uni
States District Judge, presiding; William R. Flinn, Marsh
William G. Mahaffy, Clerk.

Among other, the following proceedings were had, to wit:

June Term, 1908.

No. 1.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
THE TITLE GUARANTY & SURETY COMPANY, a corporation of
State of Pennsylvania, Defendant.

Summons Debt.

Be *ti* remembered, that heretofore, to wit, on the second day
June, A. D. 1908, came the plaintiff, by its Attorney, and filed
the Clerk's Office of said Court a præcipe for summons, which
præcipe is in the words and figures following, to wit:

Præcipe for Summons.

In the District Court of the United States in and for the District
Delaware.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
THE TITLE GUARANTY & SURETY COMPANY, a corporation of
State of Pennsylvania, Defendant.

Summons Debt.

Debt $5,010.

Damages $5,010, with Interest.

Issue summons debt to June Term, A. D. 1908.
(Sgd.) JOHN P. NIELDS,
U. S. Attorney, Dist. of Delaware

To William G. Mahaffy, Esq., Clerk U. S. District Court.

June 2, 1908.

(Endorsed as follows:) U. S. District Court, District of Delaware. No. 1, June Term, 1908. The United States of America vs.
27 The Title Guaranty & Surety Company. Præcipe for Summons debt, &c. (Sgd.) John P. Nields, U. S. Attorney for Plaintiff. Filed June 2, 1908. (Sgd.) Wm. G. Mahaffy, Clerk.

And thereupon, there was issued out of the Clerk's office of the Court aforesaid, a certain writ of summons in this cause, directed to the Marshal of said District, and against the said defendant, which summons is in the words and figures following, to wit:

Summons.

UNITED STATES,
District of Delaware, set:

The President of the United States to the Marshal of the District of Delaware, Greeting:

We command you, That you summon The Title Guaranty & Surety Company, a corporation of the State of Pennsylvania, Defendant, late of your District, if it may be found therein, so that it be and appear before the Judge of the District Court of the United States, in and for the District of Delaware, of the Third Circuit, at a session of the same Court to be holden at Wilmington, on the second Tuesday of June, A. D. 1908, to answer the United States of America, Plaintiff, of a plea that it render to the said the United States of America the sum of Five Thousand and Ten Dollars, which to the said United States of America it owes, and which from the said United States of America it unjustly detains, &c.

And have you then and there this writ.

Witness the Honorable Edward G. Bradford, Judge of the District Court of the United States, at Wilmington, this second day of June, A. D. 1908, and in the year of the independence of the United States, the One Hundre-th and Thirty-second.

[SEAL.] (Sgd.) WM. G. MAHAFFY,
Clerk of District Court, U. S.

And afterwards, to wit, on the ninth day of June, A. D. 1908, came the Marshal of said District, to whom the said summons was in form directed, and returned the same into the Clerk's office of said Court, with his proceedings endorsed thereon, in the words and figures following, to wit:

28 *Marshal's Return.*

DISTRICT OF DELAWARE, *ss:*

I hereby certify that, at Wilmington, in said District, on the Fifth day of June, 1908, I served the within named Summons by reading said Summons to Christopher L. Ward, Delaware Representative of

the within named Defendant Company, The Title Guaranty & Surety Company, and also by leaving with him a copy of same.

So answers,

WM. R. FLINN,
U. S. Marshal,

(Sgd.) By JOHN W. MITCHELL, *Deputy.*

(Endorsed as follows:) U. S. District Court, No. 1, June Term, 1908. The United States of America vs. The Title Guaranty & Surety Company. Summons Debt. Summons. (Sgd.) J. P. Nields, Esq., U. S. Attorney for Plaintiff. Returnable on the 2nd Tuesday of June, 1908. Filed June 9, 1908. (Sgd.) Wm. G. Mahaffy, Clerk.

And afterwards, to wit, on the ninth day of June, A. D. 1908, said defendant appears, by Christopher L. Ward, Esq., its Attorney, and files its præcipe for appearance, which said præcipe is in the words and figures following, to wit:

Præcipe for Appearance.

United States District Court, District of Delaware.

June Term, 1908.

No. 1.

THE UNITED STATES OF AMERICA
vs.
THE TITLE GUARANTY & SURETY COMPANY.

The Clerk will enter my appearance for the above named defendant.

(Sgd.) C. L. WARD,
Attorney for Defendant.

To Wm. G. Mahaffy, Clerk.

29 (Endorsed as follows:) United States District Court, District of Delaware, No. 1, June Term, 1908. The United States of America vs. The Title Guaranty & Surety Company. Appearance. C. L. Ward, Esq., Counsel for defendant. Filed June 9, 1908. (Sgd.) Wm. G. Mahaffy, Clerk.

And afterwards, to wit, on the fourteenth day of July, A. D. 1908, came the plaintiff, by its said Attorney, and files its declaration in said cause, which said declaration is in the words and figures following, to wit:

Declaration.

n the District Court of the United States in and for the District of Delaware.

June Term, 1908.

No. 1.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
'HE TITLE GUARANTY & SURETY COMPANY, a corporation of the State of Pennsylvania, Defendant.

Summons. Debt.

)ISTRICT OF DELAWARE, *ss:*

The United States of America, the plaintiff in this suit, by John . Nields, United States Attorney for the District of Delaware, comlains of The Title Guaranty & Surety Company, a corporation of ie State of Pennsylvania, being within the jurisdiction of this Court y its entry of a general appearance in this suit and by its compliice with the provision of the Act of Congress approved August 13, . D. 1894, Chapter 288 (28 Stat. 279), defendant in this suit, of a lea that it render to said United States the sum of Five Thousand nd Ten Dollars ($5,010), lawful money of the said United States hich it unjustly owes and detains from the said United States.

For that whereas, heretofore, to wit on the Eighth day of Octoer, A. D. 1907, in response to the advertisement, circular of inructions, specifications and blue print 68-E, of Joseph L. Knowlton, uartermaster United States Army in Charge of Construction and aptain Coast Artillery Corps, an Officer of the United States duly uthorized in that behalf, dated September 10, 1907, inviting sealed roposals for the construction among other things of a 150,000 gallon steel tank, on a 75 foot trestle at Fort DuPont, in the District 0 of Delaware, Pittsburgh Industrial Iron Works, a corporation of the State of Pennsylvania, made and submitted a proposal nd bid, dated October 8, 1907, to said Joseph L. Knowlton, an fficer of the United States, duly authorized in that behalf, for furishing all labor and material to construct a 150,000 gallon steel nk on a 75 foot trestle with all concrete foundations, complete as nown on blue print 68-E, and the heater, heater house, valve chamer, connection of tank with water mains, and a direct connection om pump discharge in pump house and running blow-off to outlet, nd doing all necessary excavating, grading, &c., to complete a tank nd tower with accessories in accordance with blue prints and speci cations heretofore referred to for the price or sum of Twelve Thoud nine Hundred and Ninety Dollars ($12,990); which said adertisement, circular of instructions, specifications and blue print 8-E and proposal, are in words and figures as follows, to wit:

Fort Du Pont, Delaware City, Del., September 10, 1907—Sealed proposals, in triplicate, will be received here until 11 A. M., October 10, 1907, for remodeling sewers and water systems and constructing 150,000 gallon tank at Fort Du Pont, Del. Information furnished upon application. U. S. reserves right to accept or reject any or all bids or any part thereof. Envelopes containing bids should be indorsed "Proposals for Sewer and Water Systems and Tank," and addressed to Captain J. L. Knowlton, Constructing Quartermaster.

Remodeling Sewer System,
Remodeling Water System,
Constructing a 150,000 gallon Steel Tank.

Construction.

General Instructions to Bidders for Construction of Public Buildings and Other Improvements at Fort Du Pont, Del., According to List Hereto Attached.

Under Advertisement Dated Sept. 10, 1907.
Bids to be Opened 11 o'clock, A. M., Oct. 10, 1907.

OFFICE OF CONSTRUCTING QUARTERMASTER,
FORT DU PONT, DELAWARE CITY, DEL., *Sept.* 10, 1907.

1. Bids for one or more of the buildings, less than the whole number called for, complete, or for any separate class of work included in the buildings (as stated below) will be received.

31 2. In submitting proposals, bidders should state the sum for which they propose to furnish the materials and perform the work required by the drawings and specifications for each class of work bid upon.

3. Proposals for the different classes of work included in the buildings should be made in the following order, viz.:

1st. The construction proper. Price for each branch of work to be stated separately.

4. Proposals giving an aggregate lump sum for construction alone, or for construction with other classes of work, for more than one building of different kinds, or for all the buildings called for, cannot be entertained. Bidders who are unwilling to accept award of contract for less than all or less than a certain number or percentage of value of all the buildings called for must so state in their bids; but any bidder who so desires may submit an alternative bid, as follows: (1) stating price for each item of work without conditions, and (2) stating reduced price for each item of work on condition that he is awarded all or a certain amount of the work bid for. In all cases where bids are not qualified by such restrictive conditions the Government will exercise the right of awarding contracts for a single building, or for any number of buildings less than the whole number mentioned in the list, either for construction or other class of work, according to its best interests.

5. Unless it is otherwise distinctly stated in the advertisement or instructions to bidders, acceptance of bids and award of contract will

e subject to the approval of the Quartermaster General of the rmy.

6. Work on the construction of the building proper will, if re-uired, commence within ten (10) days after notification of award f contract.

7. Work on the plumbing, heating, gas piping, electric wiring, nd lighting fixtures will commence at such times as the officer in harge may notify the contractor that the building is ready for same, nd must be completed within the time fixed for construction.

8. Bidders must state in their proposals the time in which they ill complete each class of work from the date of commencement ereof. Furthermore, it must be understood that, should the con-acts for the plumbing, heating, gas piping, electric wiring, and ghting fixtures be awarded separately, the contractors will be re-uired to carry forward their respective work in harmony with the ork of construction proper. In case of proposals for plumbing, eating and other classes of work it will be considered a sufficient mpliance with requirements of this paragraph if bidders state at they will begin the work as soon as the building in which it is be placed is ready to receive it and complete it at or before time fixed in contract for completing construction proper; but pro-posals for construction proper in which time for completing the work is not stated can not be considered.

9. The "General Conditions" in the specifications for construc-on proper, will, where applicable, also govern in the materials and orkmanship for all other classes of work.

10. Before submitting a proposal, each bidder should make a care-l examination of the drawings and specifications and fully inform mself as to the quality of materials and character of workmanship quired, and make a careful examination of the place where the aterials are to be delivered and work performed; and should his oposal be accepted he will be responsible for any and every error erein resulting from his failure to make such examination.

11. Plans and specifications of the buildings to be erected and her work called for will be accessible to intending bidders at the ace or places indicated in the advertisement; they will not be re-oved from those places without permission from the officer in arge of them, and then only upon a written obligation for their turn intact and in good condition, upon a fixed date, within the ne set for opening bids.

12. The successful bidder must obtain all licenses and permits d pay all expenses and charges connected therewith, and be re-onsible for all damages to person and property which may occur connection with the prosecution of his work.

13. After the acceptance of a proposal and execution of a formal ntract and bond, payments will be made from time to time on count of work actually executed and in place in the building, but payment will be made for any materials delivered and not actu-y in place. Such payments will be discretionary with the offi-of the Quartermaster's Department in charge, based upon the imated value of the quantity of such work, less twenty (20) per

cent. of the first fifty (50) per cent. of completed work, to be retained until the entire and satisfactory completion, final inspection, and acceptance of all the materials and work embraced in the contract, at which time final payment will be made: Provided, That when award is made for one contract for constructing two or more separate buildings or distinct public works, the cost of which is separately stated, payment in full, including the retained percentages, may be made for each building or work after the same has been completed and accepted, if it is completed within the time stipulated in the contract.

14. The successful bidder will be responsible for the proper care and protection of all materials delivered and work performed by him until the completion and acceptance of and final payment for all of the work embraced in his proposal; and part payments on account of such materials and work will not in any way relieve him of such responsibility.

15. Contractors must confine themselves to the established roadways and such temporary roadways as may be laid out by the United States officer in charge, or his agent, in their hauling operations. When it is necessary to cross the curbing, bridges must be constructed in a secure manner.

16. All building operations must be confined to limits designated by the officer in charge.

17. All the dirt and rubbish resulting from building operations will be removed and burned up from time to time, or otherwise disposed of as may be directed, before the close of the work.

18. Proposals should be made only on the blank forms to be obtained at this office, and should be prepared in strict accordance with the requirements made known in the advertisement and these General Instructions and the printed instructions on the blank forms.

19. The place of residence of each bidder, with post-office address, county, and State, district, or territory should be given after his signature.

20. Each proposal should be in triplicate, and must be accompanied by a guaranty signed by two responsible persons, who should justify in a sum equal to ten (10) per cent. of the total amount of the bid, guaranteeing that if the proposal is accepted within sixty (60) days from the date of the opening of the proposals, the bidder will, within ten (10) days after being notified of such acceptance, enter into a contract and give bond with good and sufficient sureties; and that in case of failure of the bidder to enter into contract and give bond, they will pay the difference between the amount of his bid and the amount for which contract may be made with another party.

21. A firm will not be accepted as a guarantor or surety, nor will a partner be accepted as a guarantor or surety for a copartner nor for a firm of which he is a member. An officer of a corporation will not be accepted as a guarantor or surety for such corporation.

22. Incorporated bonding and surety companies, officially recognized by the War Department, will be accepted in lieu of individuals as guarantors for bidders and as sureties on contractor's bonds.

23. At the option of the bidder certified checks for the amount of

e guaranty required may be received in place of other guaranty rein mentioned. These checks will be kept in a secure place and ll be returned to bidders by the officer in charge when no longer quired to protect the interests of the Government. Bidders who furnish certified checks as guaranty should note the fact on each number of their bid, giving amount of check and bank upon which it is drawn.

24. A copy of the advertisement and of the General Instructions ust be attached to at least one of the triplicate proposals.

25. The United States reserves the right to reject any or all bids, to accept any part of a bid that may be advantageous to the Gov- ment.

26. Bidders are requested to be present at the opening of proposals, ner in person or by duly authorized attorney or other representa- e.

27. In compliance with the requirements of the act of Congress proved February 24, 1905, any person or persons entering into a mal contract with the United States for the construction or repair public works shall give bond, with good and sufficient sureties, for faithful performance of such contract and with the additional igation for making prompt and full payments to all persons sup- ing him or them labor and materials in the prosecution of the k provided for in such contract. The amount of the penalty of bond will be fixed by the contracting officer, but it will not be than one-half nor more than the full amount of the consideration he contract.

28. The attention of bidders is also called to the following require- nts of existing laws and regulations affecting contractors on public ks of the United States, namely:

(a) Executive order of May 18, 1905, relative to employment of person undergoing sentence of imprisonment at hard labor, ch is as follows:

Whereas, By an Act of Congress which received Executive ap- val on February 23, 1887, all officers or agents of the United tes were as a matter of public policy forbidden, under appropriate alties, to hire or contract out the labor of any criminals who ght thereafter be confined in any prison, or other place of incarce- on for the violation of any laws of the Government of the United tes of America.

t is hereby ordered, that all contracts which shall hereafter be ered into by officers or agents of the United States involving the loyment of labor in the States composing the Union, or the ritories of the United States continguous thereto, shall, unless erwise provided by law, contain a stipulation forbidding, in the formance of such contracts, the employment of persons under- g sentences of imprisonment at hard labor which have been im- ed by courts of the several States, Territories, or municipalities ing criminal jurisdiction.

In all contracts hereafter made for the Quartermaster's De- partment the following provision will be embodied before execution of the same:

"That in the performance of this agreement the said contractor shall not, directly or indirectly, employ any person undergoing sentence of imprisonment at hard labor which may have been imposed by a court of any State, Territory, or municipality having criminal jurisdiction, nor permit such employment by any person furnishing labor or materials to said contractor in fulfillment of this agreement."

(*b*) Executive order of September 19, 1906, limiting the hours of laborers and mechanics to not over eight hour- in any one calendar day, which is as follows:

I. All Departments of the Government under the supervision of which public works are being constructed are hereby directed to notify the respresentatives stationed at such public works to report at once to their respective Departments all cases in which contractors or sub-contractors on works now under construction have required or permitted laborers or mechanics in their employ to work over eight hours in any one calendar day.

II. All Government representatives in charge of construction of public works are further directed that it is part of their duty to report to their respective Departments each and every case in which laborers or mechanics are required or permitted to work over eight hours a day on the works under supervision of such Government representatvies. Wherever reports showing work in excess of eight hours a day are received by any Department they are to be referred to the Department of Justice for appropriate action.

29. Proposals should be inclosed in sealed envelope, indorsed "Proposals for Sewer and Water Systems and Tank, at Fort D- Pont, Del.," addressed to the undersigned.

J. L. KNOWLTON,
Quartermaster, U. S. Army, in Charge of Construction.

Fort Du Pont, Delaware City, Del.

Proposal for Construction of 150,000 *Gallons Steel Tank and Tower.*

PITTSBURG, PA., *October* 8, 1907.

To J. L. Knowlton, Quartermaster U. S. Army, Fort Du Pont, Delaware City, Del.

SIR: In accordance with your advertisement and circular of instructions of September 10, 1907, inviting proposals for con-
36 struction of steel tank and tower and subject to all the conditions and requirements thereof, and of your specifications and Blue print 68-E, dated September —, 1907, copies of both of which are hereto attached, and, so far as they relate to this proposal, are made a part of it. We propose to furnish all labor and material to construct a 150,000 gallons steel tank on a 75 ft. trestle with all concrete foundations, complete as shown on blue print 68-E; also the heater, heater-house, valve chamber, connection tank with water mains and a direct connection from pump discharge in pump house and running blow-off to outlet, and doing all necessary excavating, grading, etc., to complete a tank and tower with accessories in ac-

cordance with blue prints and specifications heretofore referred to for the sum of twelve thousand nine hundred and ninety $12,990.00 dollars. Or we will furnish the tank and trestle proper and erect same on foundation furnished by the Government, not including heater, heater house, valve chamber, connections to mains and pump house or piping of any kind whatsoever, but including all arrangements, flanges, etc., for pipe connections for the sum of — Nine thousand nine hundred and eighty-five $9,985.00 dollars.

We will begin work in shop within thirty days of receipt of notice of award and —— we will complete work in field in every detail and take our plant off premises within 200 days of notice of such award.

We make this proposal with a full knowledge of the kind, quantity, and quality of the articles required, and should we receive written notice of the acceptance of all or any part thereof we will, if required by the United States or its legal representatives, enter into contract within the time designated in the advertisement, with good and sufficient sureties for the faithful performance thereof.

(Signature) PITTSBURGH INDUSTRIAL IRON WORKS.
J. S. BECKWITH, *Treasurer.*

Address, Westinghouse Building, Pittsburg, Pa.

(Signed in Triplicate.)

Guaranty to the Above Proposal.

We, The Title Guaranty & Surety Co. of Scranton and State of Pennsylvania, and —— —— of —— in the county of —— and State of —— hereby guarantee that if the accompanying proposal of Pittsbugh Industrial Iron Works dated October 8, 1907, for furnishing all labor and material for constructing a 150,000 gallon tank on a 75 ft. trestle with all accessories at Fort Du Pont, Delaware, —— be accepted in any of all of its items, or any part or parts thereof,
37 within sixty days after the opening of said proposal, the said bidder, Pittsburgh Industrial Iron Works, will, upon written notice of such acceptance, deliver accepted items within the time and in accordance with the terms of said proposal and acceptance, or will, if so required by the United States or its legal representatives, within ten days after written notification of said acceptance, enter into contract with the proper officer of the United States for the delivery of the accepted items in accordance with the terms of the said proposal and acceptance and will give bond, with good and sufficient sureties, for the faithful and proper fulfillment of such contract. And we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, to pay the United States, in case the said bidder shall fail to furnish such articles and services in accordance with said proposal as accepted, or shall fail to enter into such contract and furnish such bond, if so required, within ten days after said notice of acceptance, the difference in money between the amount of the proposal of said bidder on the articles and services so accepted and the amount for which the proper officer of the United States may

procure the same from other parties, if the latter amount be in excess of the former.

Given under our hands and seals this eighth day of October, nineteen hundred and seven.

THE TITLE GUARANTY & SURETY CO.,

[SEAL] By EDW. G. ROBERTS,
Resident Vice President.

Attest:
EDWARD BALL,
Resident Secretary.

In presence of
H. D. STOUGHTON,
As to —— ——.
H. HECK,
As to —— ——.

That, heretofore, to wit, on said Eighth day of October, A. D. 1907, the said The Title Guaranty & Surety Company, the defendant, duly executed, sealed and delivered its written guaranty to and accompanying said proposal and bid of said Pittsburgh Industrial Iron Works, by the terms of which guaranty the said The Title Guaranty & Surety Company guaranteed that if the said proposal of the said Pittsburgh Industrial Iron Works dated October 8, 1907 for furnishing all labor and material for constructing said 150,000 gallon tank on a 75 foot trestle with all accessories, at Fort Du Pont, Delaware, should be accepted in any or all of its items or any part or parts thereof, within sixty days after the opening of said proposal, the said bidder, the said Pittsburgh Industrial Iron Works, would
38 upon written notice of said acceptance, deliver accepted items within the time and in accordance with the terms of said proposal and acceptance, or would, if so required by the said United States or its legal representative, within ten days after written notification of said acceptance, enter into contract with the proper Officer of the said United States for the delivery of the said accepted items in accordance with the terms of the said proposal and acceptance, and would give bond, with good and sufficient sureties, for the faithful and proper fulfillment of said contract. And said The Title Guaranty & Surety Company further bound itself and its successors, to pay the said United States in case the said bidder, the said Pittsburgh Industrial Iron Works, should fail to furnish said articles and services in accordance with said proposal as accepted as aforesaid, or should fail to enter into said contract and furnish said bond, if so required, within ten days after said notice of acceptance, the difference in money between the amount of the proposal of said bidder, the said Pittsburgh Industrial Iron Works on the articles and services so accepted and the amount for which the proper Officer of the United States might procure the same from other parties, if the latter amount be in excess of the former; which said guaranty accompanied and is part of the said proposal, and the words

and figures of said guaranty appear in the copy of said proposal hereinbefore set forth.

That thereafter, to wit, on the Seventh day of November A. D. 1907, said proposal and bid of the said Pittsburgh Industrial Iron Works was duly accepted by said plaintiff within sixty days after the opening of said proposal for furnishing all said labor and material to construct said 150,000 gallon steel tank on a 75 foot trestle as mentioned in said specification and blue print; and thereafter to wit, on the Eighth day of November A. D. 1907, written notice and notification of said acceptance of said proposal and bid, having been duly forwarded, was given to said bidder, the said Pittsburgh Industrial Iron Works, but said Pittsburgh Industrial Iron Works did not deliver the items in said proposal so accepted as aforesaid within the time, and in accordance with the terms of said proposal and acceptance, nor make any delivery thereof whatsoever, and did not furnish said articles and services in accordance with the said proposal so accepted as aforesaid, and did not, although so required by the United States within the time prescribed by said Joseph L. Knowlton, an Officer of the United States duly authorized in that behalf, to wit, within ten days after receiving said written notification of said acceptance of said proposal by the said United States, or at any time after said notification, enter into a contract with the proper Officer of the said United States for the delivery of the items so accepted as aforesaid in accordance with the terms of the said proposal
39 and acceptance, and did not give bond with good and sufficient sureties or security for the faithful and proper fulfillment of the terms of said contract.

That thereafter, to wit, on the Tenth day of January, A. D. 1908, by reason of said failure, refusal and neglect of said Pittsburgh Industrial Iron Works, said Joseph L. Knowlton, a proper officer of the United States, duly authorized in that behalf, proceeded to contract, and did, on behalf of said plaintiff, the said United States, contract with some other person to furnish said articles and supplies and to perform said services as aforesaid, to wit, on the day and year last aforesaid, did contract with one Horace E. Horton to furnish said articles and supplies and to perform said services accepted and required as aforesaid, for the price or amount of Eighteen thousand dollars ($18,000) and thereafter did procure said articles, supplies and services from said Horace E. Horton for said price or amount of Eighteen thousand dollars ($18,000), that is to say, did contract with one, Horace E. Horton, proprietor of Chicago Bridge and Iron Works, to furnish and thereafter did procure for and on behalf of the said United States from said Horace E. Horton, proprietor as aforesaid, all the material and labor required in constructing said 150,000 gallon steel tank on said 75 foot trestle, with concrete foundation complete, together with the heater, heater house, valve chamber, connection of tank with water mains and a direct connection with pump discharge in pump house and running blow-off to outlet, also doing all excavating, grading, etc., necessary to leave the work complete, in strict accordance with said specifications, plans and blue print hereinbefore recited and set forth; and the said Joseph L.

Knowlton, an Officer of the United States duly authorized in t
behalf, forthwith caused the difference between the amount speci
by said Pittsburgh Industrial Iron Works in its said proposal,
said articles and service so accepted as aforesaid, to wit, Twelve th
sand nine hundred and ninety dollars ($12,990) and the amo
for which the said Joseph L. Knowlton, an Officer of the Un
States duly authorized in that behalf, had contracted with
Horace E. Horton, to wit, Eighteen thousand dollars ($18,000)
furnish the said supplies and to perform the said services for
whole period of the said proposal, and for which amount said Jos
L. Knowlton, a proper Officer of the United States as aforesaid
procured for and on behalf of said United States said articles
services from some other party, to wit, from said Horace E. Hor
to be charged up against said Pittsburgh Industrial Works and s
Defendant, The Title Guaranty & Surety Company, said differe
so charged as aforesaid being the sum or amount of Five thous
and ten dollars ($5,010); which said contract with said Horace
Horton is in words and figures as follows, to wit:

40 *Construction Blank.*

This Agreement entered into this tenth day of January, ninet
hundred and eight, between J. L. Knowlton, Captain Coast Artill
Corps Constructing Quartermaster United States Army, of the
part, and Horace E. Horton, Proprietor of Chicago Bridge & I
Works, Chicago, in the County of Cook, State of Illinois, of the
ond part, Witnesseth, that the said J. L. Knowlton, Captain C
Artillery Corps, Constructing Quartermaster, U. S. Army, for
in behalf of the United States of America, and the said Horace
Horton, Proprietor of Chicago Bridge & Iron Works, do coven
and agree, to and with each other, as follows:

Article 1. That the said party of the second part shall furnish
the material and labor required in constructing a one hundred
fifty thousand (150,000) gallon steel tank on a seventy-five (
foot trestle, with concrete foundations complete, together with
heater, heater house, valve chamber, connection of tank with wa
mains, and a direct connection from pump discharge in pump ho
and running blow-off to outlet, also the doing of all excavati
grading, etc., necessary to leave the work complete, on site appro
by the Quartermaster General of the Army; all to be in strict
cordance with the plans and specifications which are hereto attac
and made a part hereof as fully as if drawn and written hereon.

Article 2. That in the performance of this agreement the s
party of the second part shall not, directly or indirectly, employ
person undergoing sentence of imprisonment at hard labor wh
may have been imposed by a court of any State, Territory or
nicipality having criminal jurisdiction, nor permit such employm
by any person furnishing labor or materials to said party of
second part in fulfillment of this agreement.

Article 3. That work on this contract shall commence on or
fore the twentieth day of January, nineteen hundred and eight, sh

be carried forward with reasonable dispatch, and be completed on or before the tenth day of September, nineteen hundred and eight.

Article 4. That for and in consideration of the faithful performance of the stipulations of this agreement the party of the second part shall be paid, at the office of the Constructing Quartermaster, at Fort Du Pont, Delaware, as follows: for the work stipulated in Article 1 of this Agreement the total sum of Eighteen thousand dollars ($18,000) which amount is subject, however, to such decrease or increase as may be found necessary under the stipulations of this agreement for the omission or addition of work at unit prices. Payments shall be made at such times and in such amounts as the officer in charge of the work may elect, based upon estimates to be made by him of completed work. Upon the first fifty (50) per-
41 centum of the completed work twenty (20) percentum of the -mount of each account shall be retained until the final completion and acceptance by the Government of all the work under this contract; Provided, That on completion and acceptance of each separate building or distinct public work hereunder for which the cost is separately stated payment therefor may be made in full, including the retained percentages, if so completed within the time stipulated.

Article 5. That in case of failure of the said party of the second part to comply with the stipulations of this contract according to the true intent and meaning thereof, then the party of the first part shall have the power to complete the work at the expense of the party of the second part in such manner as the party of the first part shall deem best for the interests of the public service, either by day's labor and open-market purchase of the necessary material, or by contract or both, and any excess of cost resulting from such failure shall be charged to the party of the second part.

Article 6. That neither this contract nor any interest therein shall be transferred by the said party of the second part to any other party or parties, and any such transfer shall cause the annulment of the contract so far as the United States is concerned; all rights of action, however for any breach of this contract by the said party of the second part are reserved to the United States.

Article 7. That no member of or delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract or to any benefit which may arise herefrom.

Article 8. That this contract shall be subject to the approval of the Quartermaster General U. S. Army.

In Witness Whereof, the undersigned have hereunto placed their hands the date first hereinbefore written.

Witnesses:

JNO. D. BADGER as to

J. L. KNOWLTON,

Captain Coast Artillery Corps, Constructing Quartermaster.

GEORGE HORTON as to

HORACE E. HORTON.

(Executed in Triplicate.)

*Here add to any contract made with an incorporated compan
for its general benefit, the following words, viz: But this stipulatio
so far as it relates to members of or delegates to Congress is not to b
construed to extend to this contract. See Sec. 3740 Revised Statute

42 *Notes.*

1. The name of the principal intended to be bound as party o
the second part, whether an individual, a partnership, or a corpo
should add his name and designation after the word "by" and unde
the name of the principal.
2. This contract need not be executed under seal.

That thereafter, to wit, on the Sixth day of January, A. D. 190
demand was made upon the said defendant by the said plaintiff fo
the payment of the said amount or sum of Five thousand and te
dollars ($5010), but payment thereof has been refused and no pa
or portion of the said amount or sum has been paid to the said plain
tiff.

By reason whereof and by force of the statute in such case mad
and provided and by force of the Act of Congress approved Apri
10, 1878, Chapter 58 (20 Stat. 36) as amended by Act of Congres
dated March 3, 1883, Chapter 120 (22 Stat. 487), an action hat
accrued to the said plaintiff to remand to have of and from th
said defendant a large sum of money, to wit, the sum of Five thou
sand and ten dollars ($5,010); to the damage of the said plaintif
of Six thousand dollars ($6,000) and therefore brings this suit.

(Sgd.) JOHN P. NIELDS,
U. S. Attorney, Dist. of Delaware.

Endorsed as follows: District Court of the United States, Distric
of Delaware. No. 1. June Term, 1908. The United States o
America v. The Title Guaranty & Surety Company, a corporation o
the State of Pennsylvania. File this narr. with copy and rule ple
in fifteen days. (Sgd.) John P. Nields, U. S. Attorney, Dist. o
Delaware. To William G. Mahaffy, Esq., Clerk U. S. Distric
Court, Dist. of Delaware. Filed July 14, 1908. (Sgd.) Wm. G
Mahaffy, Clerk.

And thereupon, on the same day, on motion of said plaintiff, by
John P. Nields, Esq., its Attorney, it is ruled by the Court here tha
the said The Title Guaranty & Surety Company, the defendant
plead to the declaration aforesaid on or before the twenty-ninth da
of July, A. D. 1908, or judgment by the Court here will be rendered
against it.

And thereafter, to wit, at the September Term, of the said Dis
trict Court of the United States in and for the District of Delaware
begun and held at the City of Wilmington, in said District of Dela
ware, on the second Tuesday (being the eighth day) of September
A. D. 1908, among other the following proceedings were had, to wit:

43 June Term, 1908.

No. 1.

THE UNITED STATES OF AMERICA, Plaintiff,
v.
THE TITLE GUARANTY & SURETY COMPANY, a Corporation of the State of Pennsylvania, Defendant.

Summons Debt.

And afterwards, to wit, on the twenty-first day of September, A. D. 1908, came the said plaintiff, by John P. Nields, Esq., its attorney, and filed its motion for judgment for want of a plea under the rule; which said motion is in the words and figures following, to wit:

Motion for Judgment.

In the District Court of the United States in and for the District of Delaware, June Term, 1908.

No. 1.

THE UNITED STATES OF AMERICA, Plaintiff,
v.
THE TITLE GUARANTY & SURETY COMPANY, a Corporation of the State of Pennsylvania, Defendant.

Summons Debt.

And now, this twenty-first day of September, A. D. 1908, John P. Nields, United States Attorney for the District of Delaware, Attorney for plaintiff in the above case, moves for judgment for want of a plea under the rule. Amount of said damages to be ascertained hereafter by inquisition at bar.

(Sgd.) JOHN P. NIELDS,
Attorney for Plaintiff.

Endorsed as follows: U. S. District Court, Dist. of Del. No. 1. June Term, 1908. The United States of America v. The Title Guaranty & Surety Company. Motion of Pltff's Atty. for judgment for want of a plea under the rule, &c. Filed Sept. 21, 1908. (Sgd.) Wm. G. Mahaffy, Clerk.

44 *Judgment.*

And now, to wit, this twenty-first day of September, A. D. 1908, on motion of the plaintiff's Attorney, judgment for want of a plea, according to the rule.

And afterwards, to wit, on the thirtieth day of November, A. D. 1908, comes the said plaintiff and moves the court for an inquisition at bar; and thereupon, it is ordered by the court that an inquisition be made, taken and returned in open court by a jury to be duly drawn, sworn or affirmed and empanneled from amongst the jurors summoned and attending at this term of said court, to ascertain what damages and costs the said plaintiff has sustained on the occasion of the breaches in detention of the debt by the said defendant to the said plaintiff in the declaration mentioned.

And thereupon, the day and year last aforesaid, a jury was duly drawn, as required by said order, and sworn or affirmed and empanneled, who make return to the court, which said return is in the words and figures following, to wit:

Inquisition at Bar.

In the District Court of the United States for the District of Delaware, June Term, 1908.

No. 1.

THE UNITED STATES OF AMERICA, Plaintiff,
v.
THE TITLE GUARANTY & SURETY COMPANY.

An inquisition made, taken and returned, in open court, before the District Court of the United States for the District of Delaware, at Wilmington, in said District, on the thirtieth day of November, in the year of our Lord one thousand nine hundred and eight, by virtue of an order made by the said Court, in the nature of a writ of inquiry, upon an interlocutory judgment given by the said court against The Title Guaranty & Surety Company, a corporation of the State of Pennsylvania, the defendant, in a certain action there depending, in which The United States of America is plaintiff; by virtue of which said order Jefferson B. Foard, E. Frank Sharpley, William Green, Benjamin F. David, Caleb P. Johnson, Alfred D. Warner, Jr., Evan G. Boyd, Robert M. Taylor, Alexis I. Du Pont, Rowland W. Joseph, Charles F. Wollaston and William A. Comegys, twelve good and lawful men of the said District, being a jury
45 attending at the same Court, after the said interlocutory judgment was given, and been charged upon their respective oaths and affirmations, diligently to inquire what damages and costs the said plaintiff has sustained on the occasion of the breaches in detention of the debt by the said defendant to the said plaintiff in the declaration mentioned, they, the jurors aforesaid, upon diligent inquiry made, and evidence given in open Court, on their respective oaths and affirmations aforesaid, do say, that the said plaintiff has sustained damages, by reason of the breaches in detention of the debt by said defendant to the said plaintiff, to the amount of five thousand and ten dollars and — cent ($5,010.00); and also six cents costs, besides the cost by the said plaintiff expended about its said suit.

In Testimony Whereof, the jurors aforesaid, to this inquisition, have severally set their hands and seals, the day and year aforesaid.

(Sgd.)	JEFFERSON B. FOARD, *Foreman.*	[SEAL.]
"	E. FRANK SHARPLEY.	[SEAL.]
"	WILLIAM GREEN.	[SEAL.]
"	BENJ. F. DAVID.	[SEAL.]
"	CALEB P. JOHNSON.	[SEAL.]
"	ALFRED D. WARNER, JR.	[SEAL.]
"	EVAN G. BOYD.	[SEAL.]
"	ROBT. M. TAYLOR.	[SEAL.]
"	ALEXIS I. DUPONT.	[SEAL.]
"	ROWLAND W. JOSEPH.	[SEAL.]
"	CHAS. F. WOLLASTON.	[SEAL.]
"	W. A. COMEGYS.	[SEAL.]

Endorsed as follows: United States District Court, District of Delaware. No. 1. June Term, 1908. The United States of America, Plaintiff, v. The Title Guaranty & Surety Company. Inquisition of Damages at Bar. Filed Nov. 30, 1908. (Sgd.) Wm. G. Mahaffy, Clerk.

Final Judgment.

Thereupon, it is now, November 30, 1908, Ordered, Considered and Adjudged by the court that the said plaintiff recover against the said defendant the sum of five thousand and ten dollars ($5,010), besides the costs in said cause, to be taxed, and have execution therefor.

And on the same day, to wit, November 30, 1908, the costs in said cause were taxed by the clerk at the sum of one hundred and seventeen dollars and thirty-four cents ($117.34), and taxed bill filed.

46 And afterwards, to wit, on the fifteenth day of December, A. D. 1908, the sum of five thousand and eighteen dollars and fifty cents ($5,018.50), being the principal and interest of the above stated judgment, and one hundred and seventeen dollars and thirty-four cents ($117.34), the amount of the taxed costs, was paid into the registry of said court, through John P. Nields, Esq., Attorney of the United States for the district of Delaware, and attorney for said plaintiff, by the said defendant, in full satisfaction of the above judgment, interest and costs.

UNITED STATES OF AMERICA,
District of Delaware, ss:

I, William G. Mahaffy, Clerk of the District Court of the United States for the District of Delaware, de hereby certify that I have carefully compared the writings annexed to this certificate, and they are true copies of their respective originals and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete exemplification of the record and

proceedings in the suit of the United States of America, Plaintiff, against The Title Guaranty & Surety Company, a corporation of the State of Pennsylvania, Defendant, No. 1, to the June Term, A. D. 1908.

In Testimony Whereof, I have hereunto set my hand, and affixed the seal of said Court, at Wilmington, in said District, this seventeenth day of December, in the year of our Lord, one thousand nine hundred and eight, and of the Independence of the United States of America, the one hundred and thirty-third.

[SEAL.] WM. G. MAHAFFY,
Clerk U. S. District Court, District of Delaware.

Endorsed: No. 3781. In Bkcy. In re Pittsburgh Industrial Iron Works, Bankrupt. Title Guaranty & Surety Co. Proof of Claim. Proof of Preferred Claim. Filed Dec. 30, 1908. Wm. R. Blair, Referee in Bkcy. Filed March 25, 1909. Wm. T. Lindsey, Clerk.

Answer of Trustee to Petition of Title Guaranty & Surety Company.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURG INDUSTRIAL IRON WORKS, Bankrupt.

47 STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Samuel L. Dille, being first duly sworn, says that he is trust officer of the Guarantee Title & Trust Company, trustee of the Pittsburg Industrial Iron Works, bankrupt, at No. 3781, in bankruptcy of the bankruptcy court of the Western District of Pennsylvania, and on behalf of said trustee makes answer to the petition of the Title Guaranty & Surety Company for the payment to it by said Trustee of the sum of five thousand one hundred sixty-seven and 39/100ths ($5,167.39) dollars with interest thereon from December 11, 1908, and the rule granted thereon by the Honorable William R. Blair, Referee in bankruptcy, and says:

First. Respondent admits that said petitioner is a Surety Company as alleged.

Second. As to each and every other averment of fact contained in said petition, except such facts as are hereinafter stated by respondent, respondent is not informed and has no sufficient means of information, and therefore for the purpose of pleading denies each such averment and calls upon the petitioner to substantiate such averments by proper proof.

Third. Respondent is informed and believes that heretofore, to wit, October 8, 1907, said Pittsburg Industrial Iron Works, now bankrupt, duly executed and delivered its written proposal to J. L. Knowlton, Quartermaster U. S. Army, in the following terms:

To J. L. Knowlton, Quartermaster U. S. Army, Fort Du Pont, Delaware City, Del.

SIR: In accordance with your advertisement and circular of instructions of Sept. 10, 1907, inviting proposals for construction of steel tank and tower and subject to all the conditions and requirements thereof, and of your specifications and B P 68 E dated Sept., 1907, copies of both of which are hereto attached, and so far as they relate to this proposal, are made a part of it, we propose to furnish all labor and material to construct a 150,000 Gal. Steel tank on a 75 foot trestle with all concrete foundations complete as shown on B P-68 E, also the heater, heater house, valve chamber, connection of tank with water mains and a direct connection from pump discharge in pump house and running blow off to outlet and doing all necessary excavating, grading etc., to complete a tank and tower with accessories in accordance with B. P's and specifications heretofore referred to for the sum of twelve thousand nine hundred ninety ($12,990) dollars.

Or we will furnish the tank and trestle proper and erect same on foundations furnished by the government not including heater, heater house, valve chamber, connection to mains and pump house or piping of any kind whatsoever, but including all arrangements, flanks, etc., for pipe connections for the sum of nine thousand nine hundred eight-five ($9,985) dollars.

We will begin work in shop within 30 days of receipt of notice of award and we will complete in field in every detail and take our plant off premises within 200 days of notice of such award.

We make this proposal with a full knowledge of the kind, quantity and quality of the articles required, and should we receive written notice of the acceptance of all or any part thereof, we will, if required by the United States or its legal representative, enter into contract within the time designated in the advertisement, with good and sufficient sureties for the faithful performance thereof.

(Signature) PITTSBURG INDUSTRIAL IRON WORKS,
By J. S. BECKWITH, *Treasurer.*

Address, Westinghouse Bldg., Pittsburg, Pa.

Thereafter, to wit, November 9, 1907, after the filing of the petition in Bankruptcy in this case, said J. L. Knowlton at Fort DuPont, Delaware, mailed to said bankrupt, at Pittsburg, Pennsylvania, a written contract proposed to be executed in acceptance of the foregoing proposal and requested the same to be executed by said bankrupt; which said contract came into the possession of the receiver of said bankrupt and was never executed.

Fourth. Respondent admits that said Pittsburg Industrial Iron Works neglected and refused to comply with the terms of its said proposal.

Fifth. Respondent admits the petitioner gave written notice to the respondent of said suit of the United States and tendered to the respondent the defense to said action and that the respondent declined to undertake such defense.

Sixth. Respondent denies that said estate is indebted to the petitioner as alleged, and denies further that such petitioner is entitled to payment out of the funds now in the hands of the respondent; and on the contrary thereof avers that in any event the funds heretofore ordered to be distributed are properly distributable as ordered in accordance with the Sixty-fourth Section of the Bankruptcy Act of 1898 as now in force.

Therefore respondent asks that said rule be discharged.

SAMUEL L. DILLE.

49 Sworn to and subscribed before me this 2d day of Jany., 1909.

[SEAL.] HARRIET E. MILHOLLAND,
Notary Public.

My commission expires January 16, 1909.

Endorsed: No. 3781. In Bkcy. In re Pittsburgh Industrial Iron Works, Bankrupt. Answer to petition of the Title Guaranty & Surety Company. Filed Jan. 4, 1909. Wm. R. Blair, Referee in Bankruptcy.

(*Exceptions of Title Guaranty & Surety Company to Decree of Distribution.*)

In the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In re PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

Exceptions to Decree.

And now comes the Title Guarantee & Surety Company, and excepts to the decree of distribution made by the Referee, made under date of December 31, 1908, for the following reasons:

First. The decree does not make distribution to, nor take into consideration the claim of, this exceptant, of which claim the Trustee in Bankruptcy had knowledge on and prior to filing of its account.

Second. The decree gives a preference to the claim of this exceptant to other claims which do not by law have a preference to the claim of this exceptant.

Third. The claim of this exceptant as a surety upon the bond of the bankrupt, to the United States, and having paid the claim of the United States, is a claim entitled to satisfaction before all other claims against the bankrupt estate, and as such distribution should have first been made in full to the exceptant's claim.

Fourth. The United States is not bound by the bankruptcy Act, and hence is not subject to its provisions as to order of distribution of assets.

LYON, HUNTER & BURKE,
Att'ys for Exceptant.

50 Endorsed: No. 3781. In Bkcy. In re Pittsburgh Industrial Iron Works, Bankrupt. Exceptions to decree. Filed Jan'y 5, 1909. Wm. R. Blair, Referee in Bkcy. Filed March 25, 1909.

Supplemental Answer of Trustee to Petition of the Title Guaranty & Surety Co.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Charles A. Lawrence, being first duly sworn, says that he is assistant trust officer of the Guarantee Title & Trust Company, trustee of the Pittsburgh Industrial Iron Works, bankrupt, at No. 3781, in bankruptcy of the bankruptcy court of the Western District of Pennsylvania, and on behalf of said trustee, and for further answer to the petition of the Title Guaranty & Surety Company, says that certain of the money in the hands of the respondent, to wit, three thousand sixteen ($3,016.) dollars, is claimed by the First National Bank of Huntington, Pa., for the reasons set forth in its petition filed in the Clerk's office of said Bankruptcy court at the above number in bankruptcy, and that certain other money in the hands of the respondent, to wit, five hundred thirty-eight and 62/100ths ($538.62) dollars is claimed by one J. Kramer for the reasons set forth in his petition upon file in the office of said referee at the above number in bankruptcy.

CHAS. A. LAWRENCE.

Sworn to and subscribed before me this 9th day of January, 1909.

OSCAR BEILSTEIN,
Notary Public.

[SEAL.]

My commission expires April 10, 1909.

Endorsed: No. 3781. In Bankruptcy. In re Pittsburgh Industrial Iron Works, Bankrupt. Supplemental answer to petition of Title Guaranty & Trust Co. Filed ——, M., January 13, 1909. William R. Blair, Referee in Bankruptcy.

51 (*Amended Proof of Claim.*)

In the United States District Court for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

STATE OF PENNSYLVANIA,
County of Lackawanna, ss:

On this 19th day of January, in the year 1909, personally appeared before me the undersigned, a Notary Public in and for the said County and State, Grant L. Bell, of the City of Scranton, County of Lackawanna, State of Pennsylvania, and made oath and says; that he is the Treasurer of The Title Guaranty & Surety Company, a corporation incorporated by and under the laws of the Commonwealth of Pennsylvania, with its Home Office at Scranton, in the said County of Lackawanna and State of Pennsylvania and carrying on business in the State of Pennsylvania and other States of the United States, and that he is duly authorized to make this proof, and says that the said Pittsburgh Industrial Iron Works, the corporation against whom the petition for adjudication of bankruptcy has been filed, is justly and truly indebted to the said The Title Guaranty & Surety Company in the sum of Five thousand one hundred and sixty-seven and 39/100 ($5,167.39) Dollars; that the consideration of said debt is as follows, to wit:

On the 8th day of October, 1907, the said The Title Guaranty & Surety Company, at the request of the said Pittsburgh Industrial Iron Works, issued its written guarantee of the proposal of the latter for furnishing all labor and material for constructing 150,000 gallon tank at Fort Du Pont, Delaware, for Twelve Thousand Nine Hundred Ninety ($12,990) Dollars, which proposal was duly accepted. The said Pittsburgh Industrial Iron works neglected and refused to comply with the terms of said proposal and the work was relet in due form for the sum of Eighteen Thousand ($18,000) Dollars.

In June, 1908, suit was brought in the District Court of the United States for the District of Delaware, by the United States of America against The Title Guaranty & Surety Company, based upon said written guarantee, for the difference between the two sums, amounting to Five thousand and ten ($5,010) Dollars. Written notice of this suit was given by the said The Title Guaranty & Surety Company to the Guarantee Title & Trust Company, of Pittsburgh,
the Trustee of the said Pittsburgh Industrial Iron Works,
52 on the 22nd day of July, 1908, and the defense of the action tendered to the latter, which it declined to undertake. On the 30th day of November, 1908, judgment was recovered by the United States of America in the said action for the sum of Five Thousand and Ten ($5,010) Dollars, bearing interest from the

date of judgment and One Hundred Seventeen and 34/100 ($117.34) Dollars, costs of suit.

On the 11th day of December, 1908, the said The Title Guaranty & Surety Company paid to the United States of America the amount of said judgment debt, interest and costs, amounting to the sum of Five Thousand One Hundred and Thirty-five and 84/100 ($5,135.84) Dollars, to which should be added the cost of accompanyin- in transcript of record, Thirty-one and 55/100 ($31.55) Dollars, making in the aggregate the sum of Five Thousand One Hundred Sixty-seven and 39/100 ($5,167.39) Dollars.

And deponent further says that said claim so paid by said The Title Guaranty & Surety Company was a debt due to the United States of America and is a preferred claim against the estate of the said Pittsburgh Industrial Iron Works and should be paid in full before claims of general creditors are paid.

That no part of said debt has been paid; that there are no set-offs or counter-claims to the same and that said The Title Guaranty & Surety Company has not, nor has any person by its order or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

Deponent further prays that the Trustee of the said Pittsburgh Industrial Iron Works be ordered to pay said claim in full, to wit, the sum of Five Thousand One Hundred Sixty-seven and 39/100 ($5,167.39) Dollars, with interest from December 11, 1908.

GRANT L. BELL.

Subscribed and sworn to before me this 19th day of January, 1909.

JUDSON E. HARNEY,
Notary Public.

My commission expires at the end of the — session of the Senate.

Endorsed: No. 3781. In Bankruptcy. In re Pittsburgh Industrial Iron Works, Bankrupt. Unsecured claim amended proof of claim of The Title Guaranty & Surety Company claiming priority. Filed ——, M., January 21, 1909. Wm. R. Blair, Referee in Bankruptcy. January 23, 1909, with proof of debt examined and allowance suspended. Wm. R. Blair, Referee in Bankruptcy. Filed March 25, 1909.

53 *Report and Opinion of Referee Sur Exceptions to Decree of Distribution.*

In the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

Report and Opinion of the Referee Sur Exceptions to the Decree of Distribution.

On December 26, 1908, the account of the Trustee, after notice to all creditors, came before the Referee for distribution of the bal-

ance shown by said account, to wit: the sum of $9,440.89 and thereupon, after full hearing, a decree was made by the Referee distributing said balance, after payment of expenses, to the wages claimants whose claims were duly proved, the fund in the hands of the Trustee was insufficient to pay the wages of claimants in full.

On December 29th, a petition on behalf of The Title Guaranty & Surety Company of Scranton was filed setting forth in brief, that it had been surety on a bond of the bankrupt Company, given to the United States Government for the faithful performance of a certain contract between the United States Government and the bankrupt, and that a default had taken place on the part of the bankrupt, whereby the United States Government became entitled to claim the sum of $5,167.39 from the petitioner.

The petition further set forth, that the Government had brought suit against the petitioner in the District Court of the United States in Delaware, and on November 30, 1908, had recovered judgment against the petitioner, which, with interest and costs, amounted to the sum above named, and that said judgment has been paid by petitioner.

The petition further avers, that under the law of the United States the petitioner having paid said judgment, it was entitled to be subrogated to the right of the United States to be first paid out of the assets of the bankrupt company, and asked for an order directing the Trustee so to pay said claim, and that in the meantime all further proceedings on said decree of distribution should be stayed.

On January 6, 1909, the petitioner filed exceptions to the decree of distribution, alleging substantially the facts set forth in the petition already recited.

The adjudication in this case was entered on November 21, 1907. Upon receiving notice of the petition and of the exceptions the counsel for the Trustee and for the wages claimants objected to
54 the allowance of the exceptions and petition for the following reasons: First, because the adjudication having been entered November 21, 1907, and no proof of debt having been filed within a year of the date of the adjudication, that under section 57-*n* of the Bankruptcy Law the claimant was too late, and, second, that even admitting for the sake of argument that the petition or proof of claim was not outlawed by said section, nevertheless, under the provisions of the Bankruptcy Act of 1898, the priority of the claimant was subordinate to the priority of the wages claims.

There being no dispute as to the facts, the matters were fully argued by counsel, and upon consideration of their argument and briefs filed, the Referee respectfully reports as follows:

As to the first question, whether the petition and proof of debt were filed in time, section 57-*n* of the Bankruptcy Law is as follows: "Claims shall not be proved against the bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment; Provided, that the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer."

It is argued by the learned counsel for the claimant that the claim in this case comes clearly within the exceptions above provided as to claims in litigation, and that the judgment in the suit by the United States against the claimant having been rendered within thirty days of the expiration of the year, and the proof having been filed within sixty days after the rendition of the judgment, that, therefore, the proof is in time. And it is further argued, that at all events, under the provisions of the revised statute conferring the priority which forms the basis of the claim in this case, that the claimant is not bound by the one year limitation contained in section 57-*n* as above recited.

The Referee is of opinion, that the litigation between the United States and the claimant is not a litigation within the meaning of the section above quoted under the authority of in re Thompson 10th, A. B. R. 581.

The Referee is further of opinion, that while it is true that if the United States were claimant against this bankrupt, it would not be bound by the limitation contained in section 57-*n* that this right of exemption from the limitation which is, of course, a prerogative right of the Government, is not extended by the provisions of the revised statute to the claimant here. U. S. vs. Rider, 110, U. S. 729. The claimant's right is a right to priority only. U. S. vs. Preston, 4 Wash. (C. C.) 446. But, assuming for the purpose of argument,

55 in order to bring fully before the Court the questions argued before the Referee, that the proof of debt is in time the question then for consideration is, what is its priority? Section 3466 of the revised statutes of the United States provide as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of executors or administrators, is insufficient to pay all debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3468 of the revised statutes of the United States provides that "whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator or assignee are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator or assignee, of such surety on the bond, or the executor, administrator or assignee, of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator or assignee shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon."

Under the foregoing provisions of the revised statutes the learned counsel contend, that the claimant here is entitled to priority over the wages claims.

The Bankruptcy Law of 1898, Section 64, however, provides the order of distribution of the assets of bankrupts estates as follows:

First. "All taxes legally due and owing by the bankrupt to the United States and States, etc."

Second. "Actual and necessary cost of preserving the estate subsequent to filing of the petition."

Third. "The filing fees paid by creditors in involuntary cases, and the expense of recovering property concealed or unlawfully transferred by the bankrupt."

Fourth. "The cost of administrattion."

Fifth. "Wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of the proceedings, not to exceed $300.00 to each claimant."

Sixth. "Debts owing to any person who, by the laws of the States or of the United States, is entitled to priority."

56 The present Bankruptcy Law contains no express words repealing any of the laws of the United States in conflict with the provisions of the Bankruptcy Law, and the Referee is of opinion, that the provisions of the foregoing sections 3466 and 3468 of the revised statutes are to be considered as still existing and unrepealed, and are to be construed with the provisions of the Bankruptcy Law above quoted as being in pari materia.

Under the Act of 1867, priority was given in the following order: First, the expense of the proceedings, and, second, "All debts due to the United States, and all taxes and assessments under the laws thereof" which, it will be observed, differs from the language of the Act of 1898, which provides for taxes only as having the first priority under the present Bankruptcy Law.

The provision of the present Bankruptcy Law, that taxes alone shall first be paid is under the maxim "expressio unis est exclusio alterius" persuasive that it was not intended to include debts due to the United States, remembering that in the former Bankruptcy Law the first priority expressly included debts as well as taxes.

It seems to the Referee, that the persuasiveness of the mixim above quoted is further made practically conclusive by the further provisions of the present Bankruptcy Law, already quoted, in which it is declared, that wages shall be entitled to priority before "debts owing to any person who by the laws of the State or the United States is entitled to priority." This language could not be made more plainly applicable to the claimant's claim in the present case. The claimant bases its claim upon a debt having priority by the laws of the United States, namely, the provisions of the revised statutes above recited.

The revised statute, section 3466, provides, that the debt of the United States shall be first paid, and section 6468 provides, that the claimant shall have a like priority. This, in the opinion of the Referee means, in view of the Bankruptcy Act of 1898, that the claims shall be paid first in its class, because, otherwise the other

provisions of the present Bankruptcy Law already recited are violated, whereas, there being an inconsistency in the provisions of the revised statutes and the provisions of the present Bankruptcy Law above recited, the inconsistency can be harmonized by giving the words "shall be first paid" their proper significance of being first paid out of the class to which they belong in the order of distribution provided by the present Bankruptcy Law. If the United States were a party claimant there might be a much stronger argument made in favor of the word first, in the revised statute above mentioned having its full prerogative meaning, but in view of the language used in section 64*b*
(5) "Debts owing to any person who, by the laws of the States
57 or the United States, is entitled to priority," the Referee is of opinion that there is no room for such construction. Under this language as applied to the claim in the present case, the question is one of interpretation merely, and in view of the decisions of the Supreme Court of the United States already cited, the Referee is of opinion, that the right of the claimant in this case is limited to priority merely, and that under section 64*b* (5) its priority as a creditor who is entitled to priority under the laws of the States or the United States, is subordinate or poestrior to the claims of wage earners who are expressly given priority by section 64*b* (4).

The Referee is of opinion, that the exceptions should be dismissed, and the claim of the Title Guaranty & Surety Company to priority over the wages claims should be refused.

WILLIAM R. BLAIR,
Referee in Bankruptcy.

March 17, 1909.

Endorsed: No. 3781. In Bankruptcy. In re Pittsburgh Industrial Iron Works, Bankrupt. Report and opinion of the Referee sur exceptions to the decree of distribution. Filed — M., March 1, 1909. William R. Blair, Referee in Bankruptcy. Filed March 25, 1909, Wm. T. Lindsey, Clerk.

(*Petition of the Title Guaranty & Surety Co. for Review.*)

No. 3781. In Bankruptcy.

In re PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

Petition for Review.

To the Honorable William R. Blair, Referee in Bankruptcy:

The petition of The Title Guaranty & Surety Company respectfully represents:

That on December 29th, 1908, its petition was presented to your Honorable Court setting forth the payment by it as surety on a bond of the bankrupt company of a certain claim due the United States for default in entering into a contract which had been awarded to the government, which claim had been paid by the surety after suit brought and judgment entered against it by the United States,

and praying that a certain decree of distribution of your Honorab
Court, bearing date December 26th, 1908, distributing certai
58 funds in the hands of the Trustee to certain labor claims
suspended and the claim of the petitioner allowed as a prefe
ence under the laws of the United States. To this petition certai
exceptions were filed on the part of the Trustee and the wage claim
and after argument, your Honorable Court decided in favor of th
said wage claims and against your petitioner.

Your petitioner desires a review of the decision of your Hono
able Court by the District Court of the United States of this th
Western District of Pennsylvania, and prays that your Honorab
Court will certify this matter to the Honorable James S. Youn
Judge of the United States District Court in and for the Weste
District of Pennsylvania.

And it will ever pray.

THE TITLE GUARANTY & SURETY
COMPANY,
By EDWARD BALL,
Resident Vice President.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

Before me, the undersigned authority, personally appeared Edwa
Ball, Resident Vice President for The Title Guaranty & Surety Co
pany, petitioner above named, who, being duly sworn according
law, deposes and says that the statements contained in the foregoi
petition are true and correct, as he verily believes.

EDWARD BALL.

Sworn and subscribed before me this 20th day of March, A.
1909.

LAURA E. HUBBARD,
Notary Public.

My Commission Expires April 3rd, 1911.

Endorsed: No. 3781. In Bkcy. Pittsburgh Industrial Iron Work
Bankrupt. Petition for Review. Filed March 25, 1909.

Certificate of Referee to the District Court.

In the District Court of the United States for the Western District
Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrup

59 To the Honorable James S. Young, Judge of said Court:

I, William R. Blair, one of the Referees in Bankruptcy of sa
Court, do hereby certify that in the course of proceedings before m
the following questions arose:

First. Whether the proof of claim and petition relating thereto of the Title Guaranty & Surety Company should be allowed in view of Section 57*n* of the Bankruptcy Law, the said proof and petition having been filed subsequent to one year after the adjudication, and,

Second. Assuming that the proof of claim was filed in time for allowance under said section, whether said claim is entitled to priority to the payment of the wages claims duly proved and allowed against the bankrupt estate.

The Referee is of opinion, first, that the proof of debt was not filed in time to be allowed against the estate, and, second, that even if filed in time for allowance, that the claim was not entitled to priority over the wages claims against said estate, as per report and opinion of the Referee filed.

And I further certify, that attached hereto is the proof of claim, petition and other papers filed on behalf of the Title Guaranty & Surety Company claimant, the exceptions to the order of distribution by the Referee filed by the Title Guaranty & Surety Company, claimant; the Report and Opinion of the Referee thereon, and the order of distribution made by the Referee in pursuance of said opinion, and said questions are hereby certified to the Judge for his opinion thereon, together with the petition for this certificate.

Witness my hand this 24th day of March, A. D. 1909.

WILLIAM R. BLAIR,
Referee in Bankruptcy.

Endorsed: No. 3781. In Bankruptcy. In re Pittsburgh Industrial Iron Works, Bankrupt. Certificate. A. L. P. 80. Filed March 25, 1909.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

Argument List.

In re PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

March 25, 1909.—Certified question before Referee as to whether claim of Title Guaranty & Surety Company, a creditor, is entitled to priority over wage claims. Referee's opinion that it is not.

May 1, 1909.—Argued (Y.) C. A. V.

May 29, 1909.—Report of Referee confirmed.

60 *Petition of the Title Guaranty & Surety Co. for Allowance of an Appeal.*

In the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

Petition of the Title Guaranty & Surety Company for Allowance of an Appeal.

To the Honorable Judge of said Court:

And now, to wit, June 7, 1909, The Title Guaranty & Surety Company, conceiving itself to be aggrieved by the judgment made and entered on the 29th day of May, 1909, in the above entitled cause, confirming the report and order of William R. Blair, Esq., Referee in Bankruptcy, to the effect that the claim of The Title Guaranty & Surety Company for $5,167.39, said fund being in the hands of the Trustee of said bankrupt, was disallowed, hereby appeals to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the Assignments of Error, which are filed herewith, and prays that a citation may be granted directed to The Guarantee Title & Trust Company, Trustee of the bankrupt, Pittsburgh Industrial Iron Works, commanding it to appear before the said Circuit Court of Appeals to answer this appeal and further prays that a transcript of the pleadings, proceedings, proofs, exhibits and all documents, papers and records relating to the granting and making of said order and decree, duly authenticated be sent to the United States Circuit Court of Appeals for the Third Circuit for a review thereof.

THE TITLE GUARANTY & SURETY COMPANY,
By WALTER LYON AND
JOHN P. HUNTER,
Its Attorneys.

June 7, 1909.

Order of Court.

And now, to wit, June 8th, 1909, the foregoing claim of Appeal be not allowed.

JAMES S. YOUNG,
United States District Judge.

Endorsed: No. 3781. In Bkcy. In re Pittsburgh Industrial Iron Works, Bankrupt. Petition of The Title Guaranty & Surety Company for allowance of an appeal. Filed June 8, 1909.

Assignments of Error.

he District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

he Matter of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

Assignments of Error.

nd now, June 7, 1909, comes The Title Guaranty & Surety Com-y, claimant in the above entitled matter, by its attorneys, Walter n and John P. Hunter, and files with its petition for appeal the owing Assignments of Error, saying that in the records and pro-ings of said District Court of the United States for the Western rict of Pennsylvania in the above entitled matter, there is mani-error in the order and decree of said Court, in this, to wit:

irst. The Court erred in confirming the report and order of Wil-n R. Blair, Esq., Referee in Bankruptcy, to the effect that the m of The Title Guaranty & Surety Company for the sum of 67.39, which sum is in the hands of the Trustee of said bank-, as a claim entitled to priority to the payment of wage claims, ot allowed.

econd. The Court erred in confirming the report and order of liam R. Blair, Esq., Referee in Bankruptcy, to the effect that the m of The Title Guaranty & Surety Company, for the sum of 67.39, should not be allowed.

hird. The Court erred in not ordering that there be paid to The e Guaranty & Surety Company out of the estate of the bankrupt, he hands of the Trustee, the full amount of its claim of $5,167.39, interest from December 11, 1908, as a claim entitled to priority he payment of wage claims duly proved and allowed against the krupt estate.

ourth. The Court erred in confirming the report and order of liam R. Blair, Referee in Bankruptcy, to the effect that the claim The Title Guaranty & Surety Co., should not be allowed it as said m had not been filed within a year of the adjudication.

ifth. The Court erred in confirming the report and order of Wil-n R. Blair, Esq., Referee in Bankruptcy, to the effect that such m was not a claim liquidated by limitation within the meaning Section 57*n* of the Bankruptcy Act.

WALTER LYON,
JO-N P. HUNTER,
Attorneys for The Title Guaranty and Surety Company, Claimant.

Endorsed: No. 3871. In Bkcy. In re Pittsburgh Industrial Iron rks, Bankrupt. Assignments of Error. Filed June 8, 1909.

Appeal Bond.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

In the Matter of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

Know all men by these presents: That we, The Title Guaranty & Surety Company, as principal, and E. G. Roberts, as surety, are held and firmly bound unto The Title Guarantee and Trust Company, Trustee in Bankruptcy of Pittsburgh Industrial Iron Works, bankrupt, in the sum of eleven thousand ($11,000) dollars, to be paid to the said Trustee in Bankruptcy, its successors or assigns, as its interest may appear, to which payment well and truly to be made we bind ourselves, our successors, heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals this 7th day of June, A. D. 1909.

Whereas, lately at a District Court of the United States for the Western District of Pennsylvania, in a cause and proceeding therein pending, wherein The Title, Guaranty & Surety Company is a claimant against the estate of said bankrupt in the hands of said Trustee, involving a claim of said company in the sum of five thousand one hundred sixty-seven dollars and thirty-nine cents ($5,167.39), an order was made by said court on the 29th day of May, 1909, confirming the order and report of William R. Blair, Referee in Bankruptcy, denying the said claim of said company, and The Title Guaranty & Surety Company has prosecuted its appeal to the United States Circuit Court of Appeals for the Third Circuit to reverse and set aside said order rendered by the District Court of the United States for the Western District of Pennsylvania;

Now therefore, the condition of this obligation is, That if the above named The Title Guaranty & Surety Company shall prosecute its appeal to effect and answer all costs and damages that may be adjudged or awarded against it, if it shall fail to make said appeal good and prosecute its appeal with effect, then this obligation to be void; otherwise to be and remain in full force and virtue.

THE TITLE GUARANTEE & SURETY COMPANY,
By EDW. G. ROBERTS, *Attorney in Fact.*

63 Witnesses:
G. J. SHAFFER.
E. G. ROBERTS. [SEAL.]

25 June, 1909, this bond approved.
JAMES S. YOUNG, *Judge.*

Endorsed: No. 3781. In Bkcy. In re Pittsburgh Industrial Iron Works, Bankrupt. Appeal Bond of The Title Guaranty & Surety Company. Filed June 8, 1909.

the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

the Matter of PITTSBURG INDUSTRIAL IRON WORKS, Bankrupt.

Citation.

ITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

Guarantee Title and Trust Company, Trustee in Bankruptcy of Pittsburgh Industrial Iron Works, Greeting:

You are hereby cited and admonished to be and appear at the ited States Circuit Court of Appeals for the Third Circuit, to holden at the City of Philadelphia in the said Third Circuit, on third Tuesday of September next, pursuant to an appeal filed in Clerk's office of the District Court of the United States for the stern District of Pennsylvania, Sitting in Bankruptcy, wherein e Title Guaranty & Surety Company is Appellant, and you are ellee, to show cause, if any there be, why the decree rendered inst the said Appellant, as in said appeal mentioned, should not corrected and why speedy justice should not be done to the said pellant in that behalf. Returnable July 24, 1909.

Witness my hand this 24th day of June, A. D. 1909, at the City Pittsburgh, in the said Western District of Pennsylvania.

JAMES S. YOUNG,
United States District Judge.

And now, to wit, July 7, 1909, I hereby accept service of said citation and appeal.

R. T. M. McCREADY,
Attorney for Guarantee Title and Trust Co., Trustee in Bankruptcy of Pittsburgh Industrial Iron Works.

Endorsed: No. 3781. In Bkcy. In re Pittsburgh Industrial n Works, Bankrupt. Citation. Filed June 24, 1909.

the District Court of the United States for the Western District of Pennsylvania.

No. 3781. In Bankruptcy.

the Matter of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

Agreement of Counsel.

In pursuance of Rule 23 of the United States Circuit Court of peals for the Third Circuit, we, the undersigned counsel for the pective parties as shown, do hereby stipulate and agree that only h parts of the record shall be printed as are shown herein set th.

Docket Entries.

November 9, 1907.—Creditors' Petition filed.
November 14, 1907.—Order appointing receiver filed.
November 15, 1907.—Bond of receiver filed.
November 21, 1907.—Order of Adjudication filed.
November 21, 1907.—Order of Reference filed.
July 11, 1908.—Appointment of Trustee by referee filed.
July 13, 1908.—Bond of trustee filed.
December 26, 1908.—Order of Distribution, (totals only of labor claim schedules to be shown, counsel agreeing for the purpose of this appeal that the amounts shown in said schedule are correct, and have been properly proved and filed) filed.
December 29, 1908.—Petition for Preference of Title Guaranty & Surety Co. filed.
December 30, 1908.—Proof of preferred Claim of Title Guaranty & Surety Co., (specifications and plans attached to the exemplification of the record of the case of United States of America vs. Title Guaranty & Surety Co. in the District Court of the United States for the District of Delaware, made a part of said Proof of Claim, to be omitted) filed.
65 January 4, 1909.—Answer of Trustee to petition of Title Guaranty & Surety Co. filed.
January 5, 1909.—Exceptions of Title Guaranty & Surety Co. to Decree of Distribution filed.
January 13, 1909.—Supplemental answer of Trustee to Petition of Title Guaranty & Surety Co. filed.
January 21, 1909.—Amended proof of Claim of Title Guaranty & Surety Co. filed.
March 17, 1909.—Report and Opinion of Referee sur exceptions to decree of Distribution filed.
March 25, 1909.—Petition of Title Guaranty & Surety Co. for review filed.
March 25, 1909.—Certificate of Referee to the District Court filed.
May 29, 1909.—Order of Court confirming report of Referee filed.
June 8, 1909.—Petition of Title Guaranty and Surety Co. for allowance of Appeal filed.
June 8, 1909.—Assignments of error filed.
June 8, 1909.—Appeal Bond, Citation, filed.

LYON & HUNTER,
Attorneys for Title Guaranty & Surety Company, Appellant.
R. T. M. McCREADY,
Attorney for Guarantee Title & Trust Company, Trustee in Bankruptcy, Appellee.
SAM'L I. SPYKER,
Attorney for Wage Claimants.
CLEMENT W. FLYNN,
Attorney for Wage Claimants.

Endorsed: No. 3781. In Bankruptcy. United States District Court, Western District of Pennsylvania. In the matter of Pitts-

rgh Industrial Iron Works, Bankrupt. Agreement of counsel for inting of record. Filed July 23, 1909. Law Offices Lyon & inter, Pittsburgh, Berger Building.

the District Court of the United States for the Western District of Pennsylvania.

No. 3781.

In Bankruptcy.

In re THE PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, William T. Lindsey, Clerk of the District Court of the United tes, for the Western District of Pennsylvania, do hereby certify t the annexed and foregoing pages contain a true and correct copy the record and proceedings in the above entitled case, so full and ire as the same remains of record and on file in my office, in the y of Pittsburgh, in the said district, excepting as restricted by ulation of counsel filed.

In Testimony Whereof, I have hereunto signed my name and xed the seal of the said Court, at Pittsburgh, this 20th day of gust, A. D. 1909.

[SEAL.] WM. T. LINDSEY, *Clerk.*

STERN DISTRICT OF PENNSYLVANIA, *ss:*

I, James S. Young, District Judge of the United States, for said trict, do hereby certify that William T. Lindsey, above named, s, at the time of making the above certificate and is now, Clerk he said Court, and that the said certificate made by him is in due m of law.

JAMES S. YOUNG,
U. S. District Judge.

Pittsburgh, August 20, 1909.

STERN DISTRICT OF PENNSYLVANIA, *ss:*

I, William T. Lindsey, Clerk of the District Court of the United tes, for the Western District of Pennsylvania, do certify that the norable James S. Young, by whom the foregoing attestation was de, and who has thereunto subscribed his name, was, at the time making thereof, and still is, Judge of the District Court of the ited States in and for said District, duly commissioned and quali- ; to all whose acts, as such full faith and credit are and ought e given, as well in Courts of Judicature as elsewhere.

In Testimony Wherefore, I have hereunto signed my name and xed the seal of the said Court, at Pittsburgh, in said District, this h day of August, A. D. 1909.

[SEAL.] WM. T. LINDSEY, *Clerk.*

67 And afterwards to-wit, on the nineteenth day of October, A. D. 1909, this cause being called for argument on the transcript of record from the District Court of the United States for the Western District of Pennsylvania, before Hon. George Gray, Hon. Joseph Buffington and Hon. William M. Lanning, Circuit Judges, and being argued by counsel for the respective parties and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards, to-wit, on the twenty-ninth day of November, A. D. 1909, comes the parties aforesaid by their counsel aforesaid and the court now being fully advised in the premises renders the following opinion, to-wit:

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1909.

No. —.

TITLE GUARANTY AND SURETY CO., Appellant,
vs.
GUARANTEE TITLE AND TRUST CO., Trustee in Bankruptcy of Pittsburgh Industrial Iron Works, Appellee.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Before Gray, Buffington and Lanning, Circuit Judges.

BUFFINGTON, *Circuit Judge:*

In the court below the Pittsburgh Industrial Iron Works, the bankrupt, as so adjudged on November 21, 1907, and the Guarantee Title & Trust Company, its trustee, was thereafter elected.

68 On October 8, 1907, the Title Guaranty & Surety Company, hereafter called the surety, became surety for the bankrupt on a bond to the United States conditioned that the bankrupt comply with a bid for boilers it was making for the government. On acceptance of such bid by the government, the bankrupt defaulted. On June 2, 1908, suit was brought by the United States on the bond against the surety. Of this the trustee was duly notified and required to defend. On November 30th, 1908, judgment was recovered by the plaintiff against the surety for $5,018.50, with costs, and on December 15, 1908, the surety paid such judgment. On December 26, 1908, the account of the trustee showing a balance of $9,440.89 was filed and a decree was entered distributing said amount, after payment of expenses, to wage claims only proved, payment of which has not been made pending these proceedings. On December 29, 1908, the surety filed a petition setting forth the above facts and alleging that under the acts of Congress the undertaking of the bankrupt became and was a debt to the United States entitled

riority over all claims against the bankrupt, and the surety hav- paid such debt to the United States it became entitled under the of Congress to like priority. On December 30, 1908, formal of of such preferred claim was made, by the surety and on Jan- y 5, 1909, it filed exceptions to the decree of distribution. On rch 17, 1909, the referee filed a report and opinion reported in Pittsburgh Legal Journal 154 wherein he refused to award rity to the surety over the wage claimants and dismissed the ex- ceptions. Thereafter the court below on May 29, 1909, fol- lowing the opinion of the referee, confirmed the report. Thereupon the surety, assigning for error such action of the rt, entered the present appeal. The contention of the appellant hat the United States is given priority by R. S. Sec. 3466 over claimants for the debt owing to it. That statute provides: henever any person indebted to the United States is insolvent, whenever the estate of any deceased debtor in the hands of the cutors or administrators is insufficient to pay all the debts due n the deceased, the debts due to the United States shall be first isfied; and the priority hereby established shall extend as well cases in which a debtor, not having sufficient property to pay all debts, makes a voluntary assignment thereof, or in which the ate and effects of an absconding, concealed or absent debtor are ached by process of law, as to cases in which an act of bankruptcy committed." And that like priority is given to the surety for h debt by R. S. Sec. 3468, which is: "Whenever the principal any bond given to the United States is insolvent, or whenever h principal, being deceased, his estate and effects which came to e hands of his executor, administrator or assigns, are insufficient the payment of his debts, and in either of such cases any surety the bond, or the executor, administrator or assigns of such surety ys to the United States the money due on such bond, such surety, s executor, administrator or assignee shall have the like priority the recovery and receipt of the moneys out of the estate and ects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond in law or in equity, in his own name, for the recovery of all moneys paid thereon."

The effect of these statutes standing alone is conceded, but it is ntended the general priority therein conferred is restricted by c. 64 of the Bankruptcy Act, which provides, as is argued, first, r a primary priority to the United States for nothing but taxes clause "*a*" which provides: "The court shall order the trustee to y all taxes legally due and owing by the bankrupt to the United ates, state, county, district, or municipality in advance of the yment of dividends to creditors, and upon filing the receipts of e proper public officers for such payment he shall be credited ith the amount thereof, and in case any question arises as to the mount or legality of any such tax the same shall be heard and etermined by the court;" and for a secondary priority for other ebts under clause *b*, which provides: "The debts to have priority, xcept as herein provided, and to be paid in full out of bankrupt

estates, and the order of payment shall be * * * (4) Wages due to workmen, clerks, travelling or city salesmen or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) Debts owing to any person who by the laws of the states or the United States is entitled to priority." To sustain the contention of the appellee it must be held, first, that the United States is included in the word "person" in subdivision (5), viz.: "Debts owing to any person," etc., or secondly, that the designation of taxes under clause *a*, viz.: "All taxes legally due and owing by the bankrupt to the United States," etc., as entitled to priority, was an exclusion of the priority to the United States in all other matters. On the first point the authorities are uniform that the sovereign power is not included by the general language of a statute. In Dollar Savings Bank vs. United States, 19 Wall. 239, it is said: "It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. * * * The rule thus settled respecting the British Crown is equally applicable to this Government and has been applied frequently in the different States, and practically in the Federal Courts." Moreover, that such was the intent of the Act appears in Sec. 1, cl. 19, where a more inclusive meaning is given to the word "person." Such inclusion goes no further than "corporations * * * and officers, partnerships and women." It therefore unquestionably follows that by the passage of the Bankrupt Act there was no intent by the use of the word 'person' in subdivision (5), to restrain, diminish or affect the existing priority given to debts of the United States under R. S. Sec. 3466. And as the surety claims not on the general right of a surety under the law against a defaulting principal, but on its right of statutory subrogation under R. S. Sec. 3468, to 'the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States," it is evident that its right, like the right of the United States, is unqualified by the bankrupt law. The clear purpose of the two sections in question is to confer and enforce the statutory rights of the United States for the benefit of the surety, and unless the principle here shown to apply to the United States is also extended to the paying surety the latter is not awarded "the like priority * * * as is secured to the United States."

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On the second question, viz. that the designation of taxes under clause *"a,"* viz.: "All taxes legally due and owing by the bankrupt to the United States," etc., as entitled to priority, was an exclusion of priority in all other matters, we are, in view of the case of United States vs. Lewis, 92 U. S. 618, equally clear. In that case the statutory priority of the United States under R. S. Sec. 3466 was asserted and the effect on that statute of the bankrupt law of 1867, which gave a priority to "All debts due to the United States, and all

axes and assessments under the laws thereto," was discussed. It was there said "The United States are in no wise bound by the bankrupt act. The clause above quoted is in pari materia with the several acts giving priority of payment to the United States, and was doubtless put in to recognize and reaffirm the rights which those statutes give, and to exclude the possibility of a different conclusion." Presumably with this decision before it Congress passed the present act and in the light thereof the omission in the Act of 1898 of words expressly giving priority to debts due to the United States had no more significance than the presence of such words in the Act of 1867. In either case the statute did not affect the rights of the United States under R. S. Sec. 3466 to lessen them in any respect. In the
73 absence of any such express provision in the bankrupt law, we cannot inject one into it by construction, for, as said in United States vs. Herron, 20 Wall. 251: "Sanctioned as that principle is by two express decisions of this court, it would seem that further discussion of it is unnecessary, as it has never been questioned by any well considered case, State or Federal, and is founded in the presumption that the Legislature, if they intended to divest the sovereign power of any right, privilege, title or interest, would say so in express words; and where the act contains no words to express such an intent, that it will be presumed that the intent does not exist."

It follows therefore that the claim of the surety must be awarded priority in the distribution of the fund in the hands of the trustee.

(Indorsed:) No. 31, October Term, 1909. Title Guaranty & Surety Co. vs. Guarantee Title & Trust Co. Opinion of the court by Buffington, Circuit Judge. Filed November 29, 1909.

74 In the United States Circuit Court of Appeals for the Third Circuit. October Term, 1909.

No. 31.

TITLE GUARANTY AND SURETY COMPANY, Appellant,
vs.
GUARANTEE TITLE AND TRUST COMPANY, Trustee in Bankruptcy of Pittsburg Industrial Iron Works, Bankrupt, Appellee.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the order of the said District Court in this cause, be, and the same is hereby reversed with costs.

And it is further ordered that this cause be remanded to the said District Court with directions that the claim of the surety must be

awarded priority in the distribution of the funds in the hands of the trustee.

Philadelphia, December 1, 1909.

WM. M. LANNING,
Circuit Judge.

(Indorsement:) No. 31, October Term, 1909. U. S. Circuit Court of Appeals, Third Circuit. Title Guaranty and Surety Company, Appellant, vs. Guarantee Title and Trust Company, Trustee in Bankruptcy of Pittsburg Industrial Iron Works, Bankrupt. Entered and filed, December 1, 1909.

75 United States Circuit Court of Appeals for the Third Circuit, October Term, 1909.

No. —.

TITLE GUARANTY & SURETY COMPANY, Appellant,
vs.
GUARANTEE TITLE & TRUST COMPANY, Trustee in Bankruptcy of Pittsburg Industrial Iron Works, Bankrupt, Appellee.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

And now, to-wit, December 17 1909, this court having entered judgment at No. —, October Term 1909, upon the appeal of the Title Guaranty & Surety Company from the decree of the District Court of the United States for the Western District of Pennsylvania at No. 3781 in Bankruptcy, in the matter of The Pittsburg Industrial Iron Works, bankrupt, said judgment awarding priority to said appellant in the distribution of the fund in the hands of the trustee of said bankrupt; now, therefore, pursuant to General Order in Bankruptcy No. XXXVI, this court does hereby make and order to be filed nunc pro tunc as of the date of the entering of its said judgment, its findings of fact in said case and its conclusions of law thereon stated separately, as follows:

Findings of Fact.

First. The Pittsburg Industrial Iron Works is a corporation organized and existing under the laws of the state of Pennsylvania, and at all times hereinafter mentioned had its principal office in the city of Pittsburg, county of Allegheny, Western District of Pennsylvania.

76 Second. The Title Guaranty & Surety Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its home office at Scranton, in the county of Lackawanna, State of Pennsylvania, and conducts a general surety business in that State and numerous other States of the Union.

Third. On the eighth day of October, 1907, in response to the advertisement, circular of instructions, specifications and blue print, of Joseph L. Knowlton, Quarter-master of the United States Army, dated September 10th, 1907, inviting sealed proposals for the construction, among other things, of a 150,000-gallon steel tank, with its appurtenant structures, at Fort Dupont, in the District of Delaware, the Pittsburg Industrial Iron Works made and submitted a proposal or bid for said work, for the sum of $12,990.00.

Fourth. This bid or proposal was accompanied by a guaranty on the part of the Title Guaranty & Surety Company, that the bidder would, within ten days after written notification of the acceptance of its bid, enter into a contract with the proper officer of the United States, for the performance of the contract, and would give bond for the faithful and proper fulfillment of said contract; and further, that if the bidder should fail to perform said contract and give said bond it would pay to the United States the difference in money between the amount of the proposal as accepted and the amount for which the proper officer of the United States might procure the same from other parties, if in excess of the bid. It was upon this bond
or guaranty that the United States subsequently recovered
77 against said surety company as hereinafter stated.

Fifth. On November 7, 1907, the proposal or bid of the Pittsburg Industrial Iron Works was duly accepted by the proper officer of the United States for the said work, at the said figure of $12,990.00. No contract was ever entered into or work done by said Pittsburg Industrial Iron Works in pursuance of this proposal and acceptance.

Sixth. On November 9th, 1907, an involuntary petition in bankruptcy was filed in the District Court of the United States for the Western District of Pennsylvania against the Pittsburg Industrial Iron Works.

Seventh. On November 21st, 1907, the Pittsburg Industrial Iron Works was duly adjudicated a bankrupt.

Eighth. On January 10th, 1908, owing to the failure of the Iron Works Company to enter into a contract in pursuance of its bid, Joseph L. Knowlton, Quartermaster of the United States Army, as aforesaid, relet the contract to Horace E. Horton, proprietor of Chicago Bridge and Iron Works, for the sum of $18,000.00, and caused the difference between the said sum of $18,000.00 and the bid of the Pittsburg Industrial Iron Works of $12,990.00 to-wit, $5,010.00, to be charged up against the said Pittsburg Industrial Iron Works and said Surety Company.

Ninth. Demand was duly made on said Surety Company by the United States for the payment of the said difference of $5,010.00, and the said amount not having been paid, on June 2nd, 1908, suit was entered by the United States of America against said surety
company in the District Court of the United States for the
77½ District of Delaware, at No. 1 June Term, 1908, for the said
amount.

Tenth. On July 22nd, 1908, the surety company having been served with process in the suit by the United States, notified the

Guarantee Title & Trust Company, of Pittsburg—which compan had, on the eleventh day of July, 1908, been appointed trustee i bankruptcy of the Pittsburg Industrial Iron Works—that suit ha been so entered, and defense of the action was tendered to the sai trustee, which it declined to undertake.

Eleventh. On November 30th, 1908, final judgment was entere in said suit against said surety company, for the sum of $5,018.5 including the principal and interest, and the sum of $117.35 cost said judgment having been entered, after appearance by the defen ant, upon rule, for want of a plea, and having been liquidated b inquisition at bar.

Twelfth. On December 15th, 1908, the said final judgment wa duly paid in full by this appel-ant and satisfied of record.

Thirteenth. On December 26th, 1908, the account of the truste having shown a balance of $9,440.89, a decree was made by th Referee, distributing said balance after payment of expenses to wag claimants whose claims had been duly proved and allowed. Actua distribution has never been made.

Fourteenth. On December 29th, 1908, the petition of the suret company was filed with the Referee, setting forth in brief the surety ship on the bond of the bankrupt company to the United State Government, the default, the suit for recovery of judgment an satisfaction of the same, as above detailed. The petition furthe sets forth that under the Acts of Congress, the debt so du
78 the United States by the bankrupt by reason of its failure t comply with the terms of its proposal and the reletting o the contract, became and was a debt to the United States a prio claim against the insufficient assets of the bankrupt, and as such entitled to be first satisfied, and by reason of petitioner's suretyshi and payment, it was entitled to subrogation to the right of the Unite States, and under the Act of Congress to like priority for the re covery and receipt of the moneys out of the estate and effects o the bankrupt. The petition concluded with a prayer for paymen of full amount of claim before payment of any other claim.

Fifteenth. On December 30th, 1908, formal proof of preferre claim of Title Guaranty & Surety Company was filed, to which wa attached a full exemplification of the record of the suit by the Unite States against the surety company, in the District Court of Delaware as above stated.

Sixteenth. On January 4th, 1909, the Trustee filed answer to th petition of the surety company, which answer, inter alia, admitte that the surety company had given written notice to the said truste of the suit of the United States, tendering the trustee the defens of said action, and that the trustee had declined to undertake such defense.

Seventeenth. On January 5th, 1909, the surety company file exceptions to the decree of distribution.

Eighteenth. On March 17th, 1909, the Referee in Bankruptcy filed his report and opinion sur exceptions to the decree of distribu tion, refusing to allow the claim of the surety company eithe

generally or as a prior claim over the wage claims, and dis-
79 missing the exceptions, for the following reasons:

1. That the surety company had not proved its claim against the bankrupt estate within one year after the adjudication, as required by section 57-n of the Bankruptcy Act of 1898, and that the judgment of the United States against the surety company in the suit above referred to was not liquidated by litigation within the meaning of the exception to said Section 57-n.

2. That the claim of the surety company in any event would be entitled to distribution only under clause 5 of Section 64-b of the Bankruptcy Act of 1898, and that Section 3468 of the Revised Statute was in pari materia with said clause.

3. That while the United States as claimant would not be bound by the limitation of Section 57-n of the Bankruptcy Act as against the provisions of Section 3466 of the Revised Statutes, this right of exemption from limitation is a prerogative right of the Government and was not extended to the surety company by the provisions of Section 3468 of the Revised Statutes.

Nineteenth. That the surety company secured a review of said decree of the Referee by the United States District Court for the Western District of Pennsylvania. That Court on May 29th, 1909, filed an order confirming the report of the Referee, from which order an appeal was taken to this court.

80 *Conclusions of Law.*

First. The claim of The Title Guaranty & Surety Company is a valid claim within the provisions of Sections 3466 and 3468 of the Revised Statutes of the United States, standing alone, which in full as follows:

Section 3466. "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of executors or administrators, is insufficient to pay all debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3468. "Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator or assignee are insufficient for the payment of his debts, and, in either or such cases, any surety on the bond, or the executor, administrator or assignee, of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator or assignee shall have the like priority for
81 the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured

to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon."

Second. The provisions of the Bankruptcy Act of 1898 do not qualify or limit the rights of the United States or a paying surety otherwise entitled under Sections 3466 and 3468 of the Revised Statutes.

The provision of the Bankruptcy Act as to priority of claims is as follows:

Section 64. (*a*) "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors and upon filing the receipt of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

(*b*) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing of fees paid by creditors in involuntary cases, and, where property of the bankrupt transferred or concealed by him either before or after the filing of the petition, shall *shall* been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or
82 more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) Wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority."

Third. The United States is not included under the term "person" as used in Section 65-b5 of the Bankruptcy Act of 1898.

Fourth. The Title Guaranty & Surety Company, having been surety on a bond given by said bankrupt to the United States, and having paid to the United States the money due upon such bond, it should not receive distribution under clause 5 of Section 64-b of the Bankruptcy Act of 1898, and on the contrary thereof, is entitled to priority over all other claims under Sections 3466 and 3468 of the Revised Statutes.

Fifth. The limitation for proof of claims against a bankrupt estate provided by Section 57-n of the Bankruptcy Act of 1898 does not apply to the claim of The Title Guaranty & Surety Company in this case.

PER CURIAM.

(Indorsed:) No. —. October Term 1909. Title Guaranty & rety Company, Appellant vs. Guarantee Title & Trust Company, ıstee in Bankruptcy of Pittsburg Industrial Iron Works, Bank- ɔt, Appellee. Findings of Fact and Conclusions of Law. Filed ɔember 17, 1909.

UNITED STATES OF AMERICA, *ss:*

Title Guaranty and Surety Company, Greeting:

You are hereby cited and admonished to be and appear at a preme Court of the United States, at Washington, within 30 days m the date hereof, pursuant to an order allowing an appeal filed the Clerk's Office of the United States Circuit Court of Appeals the Third Circuit wherein Guarantee Title and Trust Company, ıstee in bankruptcy of Pittsburgh Industrial Iron Works, bank- ɔt, is appellant and you are appellee, to show cause, if any there why the decree rendered against the said appellant should not be rected, and why speedy justice should not be done to the parties that behalf.

Witness, the Honorable William R. Day, Associate Justice of the preme Court of the United States, this 18th day of December, the year of our Lord one thousand nine hundred and nine.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Service of within citation accepted this 27" day of Dec. 1909. Walter Lyon, John P. Hunter, G. J. affer, Att'ys for Title & Guaranty Surety Co., Appellee.

UNITED STATES OF AMERICA, *Sct.:*

I, William H. Merrick, Clerk of the United States Circuit Court Appeals for the Third Circuit, do hereby certify that the foregoing ges from one to eighty-five inclusive, to contain a full, true, com- te and faithful copy of the original transcript of record and pro- dings in the case of the Guarantee Title & Trust Company, Trus- in Bankruptcy of Pittsburg Industrial Iron Works, Bankrupt, ppellant, and. Title Guaranty & Surety Company, appellee on file d now remaining among the records of the said court in m*h* office. In testimony whereof, I have hereunto subscribed my name and xed the seal of the said Court at Philadelphia, this fifteenth day January in the year of our Lord one thousand nine hundred and

ten, and of the Independence of the United States the one hundred and thirty-fourth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 21,970. U. S. Circuit Court Appeals, 3d Circuit. Term No. 188. Guarantee Title & Trust Company, trustee in bankruptcy of Pittsburgh Industrial Iron Works, bankrupt, Appellant, vs. Title Guaranty and Surety Company. Filed January 17th, 1910. File No. 21,970.

IN THE

Supreme Court of the United States

No. 188 OCTOBER TERM, 1911.

GUARANTEE TITLE & TRUST COMPANY, Trustee in Bankruptcy of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt, Appellant,

vs.

TITLE GUARANTY & SURETY COMPANY.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR APPELLANT.

R. T. M. McCREADY,
Attorney for Appellant.

Smith Bros. Co. Inc., Franklin Print, 412 Grant Street, Pittsburgh, Pa.

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IN THE

Supreme Court of the United States

No. 188 OCTOBER TERM, 1911.

GUARANTEE TITLE & TRUST COMPANY, Trustee in Bankruptcy of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt, Appellant,

vs.

TITLE GUARANTY & SURETY COMPANY.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

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(1) Statement of the Case.

The questions involved are (a) the right of the United States, under R. S. Sec. 3466, to be first paid from the estate of a bankrupt debtor, to the exclusion of labor claims, duly filed, to which distribution is asked under Sec. 64 of the Bankruptcy Act of 1898; (b) the right of a surety on the bond of the bankrupt to the United States, who has paid to the United States the money due on such bond, to have a like priority of payment over labor claims, under R. S. Sec. 3468; (c) the right of such paying surety to receive distribution from the bankrupt estate under R. S. Sec. 3468, without complying with the requirement of the Bankruptcy Act as

to filing proof of debt within one year from date of adjudication; (d) the right of such paying surety to ask that its claim against the bankrupt shall be deemed to have been liquidated by litigation, within the exception of Sec. 57 n of the Bankruptcy Act, which extends the time for filing proofs in such case, by reason of the fact that the surety did not pay the United States until the latter had sued the surety and obtained judgment against it by default, for want of a plea.

The Title Guaranty & Surety Company duly guaranteed that if the United States accepted a certain proposal of the Pittsburgh Industrial Iron Works for furnishing and constructing a certain water system and tank, and if the Pittsburgh Industrial Iron Works failed to furnish and construct the same, then it, the Title Guaranty & Surety Company, would pay to the United States the difference in money between the amount of such proposal and the amount for which the same labor and materials should be duly procured from other parties. Said proposal was accepted by the United States, and thereafter the Pittsburgh Industrial Iron Works became bankrupt and wholly failed to comply with said proposal. The same labor and materials were duly procured from other parties at an added cost of Five Thousand Ten Dollars. The Title Guaranty & Surety Company refused to pay said added cost; whereupon it was sued by the United States therefor, and allowed judgment to be entered against it, for want of a plea, having first tendered to the trustee of said bankrupt, the defense of the action. The amount of this judgment was paid by the Title Guaranty & Surety Company to the United States; and upon its claim against the bankrupt estate for the amount of such payment, the questions above mentioned arise.

The material chronology of the case is as follows:

November 21, 1907. Pittsburgh Industrial Iron Works adjudicated bankrupt.

June 2, 1908. Suit entered by United States against Title Guaranty & Surety Company as surety for bankrupt.

July 22, 1908. Title Guaranty & Surety Company notified bankrupt's trustee of said suit and tendered to the trustee the defense, which it declined to undertake.

November 30, 1908. Final judgment in said suit, against Title Guaranty & Surety Company for want of a plea, for the sum of $5018.50, together with $117.34 costs.

December 15, 1908. Said judgment paid by defendant.

December 26, 1908. Decree of distribution by Referee in bankruptcy distributing to labor claims the balance for distribution in the hands of Guarantee Title & Trust Company, trustee in bankruptcy of Pittsburgh Industrial Iron Works.

December 29, 1908. Petition of Title Guaranty & Surety Company presented to Referee, before actual distribution made, setting forth the facts in relation to its said payment to the United States as surety for the bankrupt, and asking that its said claim be paid before payment of any other claims.

December 30, 1908. Formal proof of preferred claim in bankruptcy filed by Title Guaranty & Surety Company against Pittsburgh Industrial Iron Works, bankrupt, for the amount so as aforesaid paid to the United States.

January 4, 1909. Answer of trustee filed.

January 5, 1909. Exceptions to aforesaid decree of distribution filed by Title Guaranty & Surety Company.

March 17, 1909. Report of Referee filed refusing to allow claim of Title Guaranty & Surety Company either generally, or as a prior claim over the wage claims, and dismissing the exceptions.

May 29, 1909. Report of Referee confirmed by District Court.

December 1, 1909. Opinion and decree of United States Circuit Court of Appeals reversing the order of the District Court and directing that priority be awarded to the claim of the Title Guaranty & Surety Company.

December 17, 1909. Findings of fact and conclusions of law filed by Circuit Court of Appeals, *nunc pro tunc*, as of the date of the entering of its said judgment.

December 18, 1909. Appeal to Supreme Court.

(2) Specification of Errors.

FIRST. The Court erred in holding and decreeing that the claim of the Title Guaranty & Surety Company is a valid claim within the provisions of Sections 3466 and 3468 of the Revised Statutes of the United States, standing alone.

SECOND. The Court erred in holding and decreeing that the provisions of the Bankruptcy Act of 1898 do not qualify or limit the rights of the United States, otherwise entitled under Section 3466 of the Revised Statutes of the United States.

THIRD. The Court erred in holding and decreeing that the provisions of the Bankruptcy Act of 1898 do not qualify or limit the rights of a paying surety upon a bond of a bankrupt to the United States, otherwise entitled under Section 3468 of the Revised Statutes of the United States.

FOURTH. The Court erred in holding and decreeing that the United States is not included under the term "person" as used in Section 64-b5 of the Bankruptcy Act of 1898.

FIFTH. The Court erred in holding and decreeing that the Title Guaranty & Surety Company, having been a surety on a bond given by a bankrupt to the United States, and having paid to the United States the money due on said bond, should not receive distribution from the estate of its bankrupt principal under clause 5 of Section 64-b of the Bankruptcy Act of 1898, and on the contrary thereof, is entitled to priority over all other claims, under Sections 3466 and 3468 of the Revised Statutes of the United States.

SIXTH. The Court erred in holding and decreeing that the limitation for proof of claims against a bankrupt estate, provided by Sections 57-n of the Bankruptcy Act of 1898, does not apply to the claim of the Title Guaranty & Surety Company in this case.

SEVENTH. The Court erred in holding and decreeing as follows:

> "It therefore unquestionably follows that by the passage of the Bankruptcy Act there was no intent by the use of the word 'person' in sub-division 5 [Section 64] to restrain, diminish or affect the existing priority given to debts of the United States under R. S. Sec. 3466. And as the surety claims not on the general right of a surety under the law against a defaulting principal, but on its right of statutory subrogation under R. S. Sec. 3468, to 'the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States,' it is evident that its right, like the right of the United States, is unqualified by the bankrupt law. * * * It follows therefore that the claim of the surety must be awarded priority in the distribution of the fund in the hands of the trustee."

EIGHTH. The Court erred in making and entering the following decree:

> "This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania, and was argued by counsel.
>
> On consideration whereof, it is now ordered, adjudged and decreed by this court that the order of the said District Court in this cause be and the same is hereby reversed with costs.

And it is further ordered that this cause be remanded to the said District Court with directions that the claim of the surety must be awarded priority in the distribution of the funds in the hands of the trustee."

Argument.

I. Bearing of the Bankruptcy Act of 1898 upon claims of the United States.

The important question in this case is whether or not claims of the United States against a bankrupt, are affected by the Bankruptcy Act. The Circuit Court of Appeals for the Third Circuit has held, in this case, that they are not. The reason given for this ruling is the following naked syllogism:

"The sovereign power is not included by the general language of a statute.

There are no special and particular words in the Bankruptcy Act that strike down the right given the United States by R. S., Section 3466.

Therefore the right of the United States under R. S., Section 3466, is not affected by the Bankruptcy Act."

That this reasoning is faulty will be shown by the following propositions:

(a) The sovereign power is included by the general language of a statute where it appears by necessary implication, or is clear from the nature of the mischiefs to be redressed, or the language used, that the govern-

ment itself was in contemplation of legislature. *United States vs. Hoar,* 2 Mason, 311. And it is clear from the language and purposes of the Bankruptcy Act that claims of the United States were in contemplation of Congress.

(b) Statutory provisions that go to the root of the tree of human contentment, which bears fruit in the safety of the nation, extend to the sovereign through the general language of a statute. By force of this doctrine the United States is bound by the provision of the Bankruptcy Act here in question, which merely gives to wage claims, "not to exceed $300 to each claimant," priority over all other claims except taxes and costs.

LANGUAGE OF THE BANKRUPTCY ACT.

That claims of the United States are within the purview of the Bankruptcy Act is clear from its language, in designating certain claims of the United States, *i. e.,* taxes, to have priority, Sec. 64-a; in stipulating that certain debts owing to the United States, *i. e.,* penalties and forfeitures, shall not be allowed, except for the amount of actual pecuniary loss, Sec. 57-j; in designating certain debts due to the United States, *i. e.,* taxes, to be excepted from the general release following a discharge in bankruptcy, Sec. 17-(1); in enacting that "the bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws * * * of the United States," Sec. 4-b.

It is evident that no fixed formula of words is required in order that a right given to the sovereign may be taken away. The rule that a law, for example, placing a time limit upon actions for debt, does not bind

the sovereign, means merely that the sovereign power is presumably legislating for its subjects, and not for itself. The reason of the rule was so stated in *Attorney General vs. Donaldson,* 10 Mees. & W., 117 (1842) where Alderson, B., said:

> "It is inferred *prima facie* that the law made by the Crown, with the assent of Lords and Commons, is made for subjects and not for the Crown."

This being the reason of the rule, its application fails when the sovereign is expressly referred to, in a law, in such manner as to make it apparent, under the ordinary canons of construction, that the law was intended to extend to the sovereign.

Under the rule *expressio unius exclusio alterius est,* alone, the Bankruptcy Act must be held to extend to claims of the United States. When the law makers singled out taxes due to the United States to have priority over costs and wages (Sec. 64) they must be deemed to have intended to exclude from such preference all other claims of the United States.

The Circuit Court of Appeals holds that this point is ruled to the contrary in *United States vs. Lewis,* 92 U. S., 618. That case was the case of a claim of the United States against an insolvent partnership, presented against the bankrupt estates of certain of the partners. The only question of any difficulty in the case was as to joint or several, individual or partnership, liability. There was hardly more than a passing reference to the question of priority, it being a self evident truth that claims of the United States must be first paid when it was so enacted affirmatively both by Section 3466 of the Revised Statutes, and by the bankrupt act of

1867, then in force. True, it was there said that "The United States are in no wise bound by the bankrupt act." But, as quoted by the Circuit Court of Appeals in its opinion in this case, the opinion in the *Lewis case,* referring to the clause of the bankrupt act giving priority to all debts, taxes and assessments due to the United States, continues:

> "The clause above quoted is *in pari materia* with the several acts giving priority of payment to the United States, and was doubtless put in to recognize and reaffirm the rights which those statutes give, and to exclude the possibility of a different conclusion."

The United States was not bound, to its detriment, by the bankrupt act of 1867, because, as here stated, that act, in express terms re-enacted the provisions of Sections 3466 of the Revised Statutes. The Circuit Court of Appeals bases its decision, on this phase of the case, upon an inference that it states as follows:

> "Presumably with this decision before it Congress passed the present act, and in the light thereof the omission in the Act of 1898 of words expressly giving priority to debts due to the United States, had no more significance than the presence of such words in the Act of 1867."

This inference is logical if we assume that the United States cannot be bound in any case by implication; but it is beside the point at issue, in that the action of the lawmakers in omitting from the Bankruptcy Act of 1898 the provision of the law of 1867 which reaffirmed the priority of debts due to the United States, is not enveloped in darkness, but, on the contrary, may be viewed in the no uncertain light which comes from the fact that the Act of 1898 gives priority to certain debts due to the

United States, and by distinct provisions brings the other claims of the United States within the operations of the Act.

And if it be said that the real position of the Circuit Court of Appeals is that the priority heretofore given to claims of the United States can be limited or taken away only by words expressly so stating, the answer to that position is found in the very case quoted by that court, *United States vs. Herron,* 20 Wall., 251. It is there generally stated that if an act contains no words to express an intent to divest the sovereign power of a given right, it will be presumed that the intent does not exist. But nothing is said as to the manner in which the intent must be expressed; and it is of interest to consider how this Court undertook to ascertain whether or not such intent was expressed in that particular case. The question there was whether or not a discharge in bankruptcy under the bankrupt law of 1867, discharged a surety upon a bond to the United States; and the method of inquiry was not a mere examination of the law to ascertain whether or not it said in so many words that a debt due to the United States shall be discharged by a discharge in bankruptcy. On the other hand, the inquiry began with the proposition stated by this Court as follows:

> "Confessedly the United States is not named in any of the provisions of the act providing for the discharge of the bankrupt from his debts."

Careful consideration was then given to the provisions of the law as to creditors, in order to ascertain whether or not the United States should be held to be included in the term "creditor." It was concluded that the provisions as to creditors could not justly and rea-

sonably be applied to the United States, and the decision was based rather upon that consideration than upon the rule requiring the United States to be named in order to be bound.

Therefore the case of *United States vs. Herron* has been treated as indicating that an intention to bind the United States may be inferred without an affirmative declaration that it shall be bound. Speaking of that case in *Fink vs. O'Neil,* 106 U. S., 272, a case to be considered later, it was said:

> "It is true that in *United States vs. Herron,* 20 Wall., 251, it was decided that a debt due to the United States is not barred by the debtor's discharge with certificate under the bankrupt act of 1867; but in that case Mr. Justice Clifford took pains, by a careful collation of numerous provisions of the statute, to show that the words 'creditor or creditors' as contained in the act did not include the United States, adopting and extending the definition by Mr. Justice Blackburn in *Woods vs. De Mattos,* 3 Hurl. & Colt., 987, 995, because used in the sense of persons having a claim which can be proved under the bankruptcy act, and not required by the act to be paid in full in preference of all others."

Examining the present Bankruptcy Act by the same method, there is no escape from the conclusion that, in drawing the Act, the lawmakers had in mind claims of the United States, and, by sufficient words, made its schedule of distribution to embrace such claims.

The schedule of distribution of the Bankruptcy Act reads as follows:

Sec. 64. Debts which have priority. a. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be:

(1) the actual and necessary cost of preserving the estate subsequent to filing the petition;

(2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery;

(3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow;

(4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant.

(5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

Surely it would be difficult to make it clearer that costs and wages are not to be subordinated to any claim of the United States other than taxes, in any other way that by enacting that taxes due to the United States are to be paid before costs and wages.

And the Bankruptcy Act goes further, as above indicated, in enacting that the United States is to be treated as a creditor, within the meaning of the Act. It is true that paragraph (9) of Section 1, of the Bankruptcy Act enacts that the word "creditor" "shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy," and it is true also that such words as "anyone" standing alone, do not embrace the government, as a general rule.

Therefore, under the ordinary application of this rule, the United States would not be considered a creditor, under the definition of paragraph (9) of Section 1 of the Bankruptcy Act. But the reason of the rule, which is that presumably the law is for subjects only, fails whenever an intention to embrace the government reasonably appears.

Thus in the *Magdalen College Case*, 6 Coke's Rep., 66, to be referred to at more length later, it was express-

ly held, from the nature of the law, that the Queen was included in the general term "persons." From this case and otherwise it must appear that the declaration quoted by the Circuit Court of Appeals from *Dollar Savings Bank vs. United States*, 19 Wall., 239, to the effect that "the most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect him, the King, not in the least, if they may tend to restrain any of his rights and interests," must be taken with the qualification that the case is otherwise either where, from the words of the law, it appears that it is intended to include the King, or where, from the purposes of the law, for cogent reasons of public policy, it is apparent that the King should be included.

This will be found to meet the objection of the Circuit Court of Appeals that the United States cannot be held to be included in the term "person" as used in Section 64-b (5) *supra*. And the force of this argument is not lessened by the fact that in the definitions of the Act [Section 1 (19)] it is said that "persons" shall include corporations.

Considering further, for the present, merely the language of the Bankruptcy Act, it will be noted that in Chapter VI, entitled "Creditors," it is enacted in paragraph j of Section 57, under the heading "Proof and Allowance of Claims," as follows:

> "Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

Here then we find it indicated by express words that claims of the United States are to be proved and allowed in Bankruptcy, thus bringing a claim of the United States within the definition of paragraph (11) of Section 1 of the Act, which says that "'debt' shall include any debt, demand or claim provable in bankruptcy."

The foregoing conclusion is further borne out by Section 17 of the Act, which begins as follows:

> "Sec. 17. Debts not affected by a discharge. A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as
>
> (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides."

Can there possibly be found here any other meaning than that all claims of the United States are debts provable in bankruptcy, and that a discharge in bankruptcy releases the bankrupt from all claims of the United States except such as are due "as a tax?" Here again the maxim *expressio unius exclusio alterius est*, is persuasive.

Then again, it may be asked, if a claim of the United States is not a debt provable in bankruptcy, why the provision of Section 4-b, that any liability of the officers, directors or stockholders of a corporation, under the laws of the United States, shall not be affected by the discharge in bankruptcy of the corporation?

PURPOSES OF THE BANKRUPTCY ACT.

The Circuit Court of Appeals halts at the sound of the dogma "that the King is not bound by any act of Parliament unless he be named therein by special and particular words."Although the archives of the courts of England are full of exceptions to this rule, and although this Court, in more than one well considered case has adopted the reasoning of the English cases in allowing exceptions to the rule, of a kind with that contended for here, the opinion of the Circuit Court of Appeals pays no heed to such cases, or to their line of reasoning. The English cases squarely hold, *inter alia,* that the King is bound by the general words of a statute, "which provides necessary and profitable remedy for the maintenance of religion, the advancement of good learning, and for the relief of the poor." This Court has adopted so much of this exception as does not conflict with our principles of government.

Fink vs. O'Neil, 106 U. S., 272, was a bill to restrain a United States marshal from proceeding under a *fieri facias* upon a judgment in favor of the United States, levied on real estate of the defendant, claimed by him as his exempt homestead. A demurrer having been filed on behalf of the United States, a decree was rendered allowing the homestead exemption of forty acres provided for by the law of the State, Wisconsin. While the opinion suggests that the United States is subject to the claim of exemption in Wisconsin, if for no other reason, because the right of exemption in that State is an exception to the liability to execution, so as to be a burden subject to which the United States takes the right to issue an execution under Sec. 916 of the Revised

Statutes, which provides that "the party recovering a judgment in any common law case in any Circuit or District Court, shall be entitled to similar remedies upon the same by execution or otherwise to reach the property of the judgment debtor as are now provided in like case by the laws of the State in which the court is held," it may be questioned whether the decision is not better supported by the position, further taken in the opinion, that the United States is bound by the general words of the exemption law by virtue of the exception above mentioned.

If it be true, as suggested in *Fink vs. O'Neil,* that the sovereign right has no means of collection in such a case, except that provided for by the State statute relating to executions, and if it be true, further, as suggested by the Circuit Court of Appeals in the present case, that the United States is in no way bound or affected by the Bankruptcy Act, then the present claim fails by force of these suggestions. The position of the appellee in this case depends upon the proposition that, upon a showing that one, debtor to the United States, is insolvent, the United States is entitled to claim payment under the statute, *ex proprio vigore.* The claim in this case is not made under the Bankruptcy Act, but, on the contrary, in derogation of it.

If the United States, as a judgment creditor of an insolvent defendant, claiming his exemption, is not entitled to the benefit of the statutory processes provided for "the party recovering a judgment in any common law case in any Circuit or District Court" except with the limitation as to exempt property that attaches to such processes by virtue of the law of the State, then, with what reason, can the United States ask distribution from the Bankruptcy Court without conceding the ex-

emptions and priorities provided for by the Bankruptcy Act?

This leads to a consideration of the other and firmer ground upon which the decision in *Fink vs. O'Neil, supra,* was placed, viz: that out of consideration of public policy, the United States is bound by the general terms of an exemption law, that does not extend to the United States in express terms. Referring to this aspect of the case, the opinion concludes as follows:

> "In *Magdalen College Case,* 11 Rep. 66b, Lord Coke, referring to *Lord Berkley's Case,* Plowd. Com. 233,246, declares that it was there held that the King was bound by the statute De Donis, 13 Edw. I. C. 1, because, for other reasons 'it was an act of preservation of the possession of noblemen, gentlemen and others,' and 'the said act,' he continues, "shall not bind the King only, where he took an estate in his natural capacity, as to him and the heirs male of his body, but also when he claims an inheritance as King by his prerogative."
>
> By parity of reasoning based on the declared policy of States, where the people are the sovereign, laws which are acts of preservation of the home of the family exclude the supposition of any adverse public interest, because none can be thought hostile to that, and the case is brought within the humane exception that identifies the public good with the private right, and declares 'that general statutes which provide necessary and profitable remedy for the maintenance of religion, the advancement of good learning, and for the relief of the poor, shall be extended generally according to their words,' for civilization has no promise that is not nourished in the bosom of the secure and well ordered household."

With equal confidence it may be asserted that a just and reasonable construction of the law will extend to the United States the provision of the Bankruptcy Act giving to labor claims accruing within three months, not to exceed three hundred dollars each, priority of payment next after costs, fees and expenses. The statutory priority of labor claims within certain defined limits, which obtains not only under the Bankruptcy Act, but also generally throughout the various States, in cases of insolvency, is as well within the definition of a statute "for the relief of the poor," as is a statute providing for a homestead exemption; and moreover, it is of much wider application.

The first priority given to the United States was in the matter of bonds for the payment of duties, Act of July 31, 1789. The Act of March 3, 1797, extended this priority to all insolvents, "indebted to the United States, by bond or otherwise." In those early days of the Republic, it was apparently deemed wise to secure the revenues of the United States, and its other claims, even at the expense of the wage earner; and at the close of the Civil War, with its burdens upon the people, in making up a schedule of distribution of insolvent estates, under the bankrupt law of 1867, Congress manifestly determined to retain for the United States the same priority as before. In 1898 a different condition prevailed. The old ratio between the necessities of the nation and the necessities of the common people had disappeared. The nation had grown rich and powerful. The numbers of its citizens working for wages, had grown to millions. A bankruptcy law was to be drawn, under whose operations it was to be expected that wage earners would be affected in almost every case. It was drawn in such a way that

on its face it gives ordinary and reasonable priority to wage earners. To hold that such priority extends to claims of the United States, other than taxes, is not to take away the priority of the United States under Sec. 3466 of the Revised Statutes. The position of claims of the United States under the Bankruptcy Act, except with reference to wage claims, is not involved in this case. To say that wage claims have priority over claims of the United States, other than claims for taxes, is merely to hold that a provision giving priority to wage claims in cases of insolvency, extends to the sovereign by virtue of the rule that the sovereign is bound by the general terms of statutes that provide necessary and profitable remedy for the advancement of good learning and for the relief of the poor. Such was declared to be sound law by this Court in *Fink vs. O'Neil, supra.* If, as declared in that case, "civilization has no promise that is not nourished in the bosom of the secure and well ordered household," can it not be said with equal force, in these days of socialistic tendencies, that to take the bread from the mouth of the workingman, is to feed the minds of himself and his family with poison while starving their bodies?

The people formed this nation for a purpose which they declared as follows:

> "We, the People of the United States of America, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

In view of this purpose, assuming the right of the United States to legislate for its own priority of payment, there was no room for criticism as long as the people, through their representatives, gave to the nation priority over all other claims, including wages. But when the people, through their representatives, saw fit to enact that taxes due to the United States or to any State, county, district or municipality should be paid first from a bankrupt estate, and then costs, fees, expenses and wages, in that order, is the Supreme Court of the United States to be prevented from adopting a humane construction of the Act, not inconsistent with the laws of construction as it has declared them, merely because such humane construction would, without particular words to that effect in the statute, diminish a claim of the United States by the amount of the slender wages of the poor?

The purpose of the law in giving priority to wages is so manifest as to require and receive little discussion. In *Heckman vs. Tammen,* 184 Ill., 144, referring to legislation giving priority to wages in cases of insolvency, it was said:

> "This legislation is remedial and should be liberally construed. In most cases such laborers have no available means to make sure their demands for labor. Such demands are usually small and payable at short intervals, and it is but the enactment of the simplest natural justice into law that when the chattel property used in the business is seized by creditors and the business is thereby suspended, such property should be held for the payment of such labor demands before other creditors are paid. Almost from time immemorial similar protection has been awarded to seamen."

There would be less reason for construing the provision here in question as one strictly in relief of the poor, if it were not so clearly limited to those who may by liberal construction be termed the poor, and if it were not so manifestly intended to prevent want by securing to the laboring classes the daily wages upon which they and their families customarily depend for their daily food. As first enacted, this priority was given only to the wages of workmen, clerks and servants. By the amendment of June 15, 1906, it was extended to travelling or city salesmen. To persons so employed the loss of position, following the bankruptcy of the employer, is serious in itself; add to this the loss of the wages of weeks or months, and the unfortunate victim and his family, in many cases, might, and probably would, become charges upon the district.

In holding that wage claims should be given a preference in bankruptcy over the lien of a chattel mortgage irrespective of whether under State law the mortgage lien is superior or not, in the case of *McDavid Lumber Company,* 27 A B.. R. 39 (D. C.) the federal court said:

> "When Congress, however, provides the order of payment and gives, preference to a certain class of claims, such as taxes, cost of administration, and wages in limited amounts for a definite time, such legislation can have no other effect in reality than to create a lien in favor of the claims thus preferred. Undoubtedly it was intended by Congress that when property of employers should be placed in bankruptcy and beyond the reach of those who had aided in its creation, to charge and impress such property to the limited extent noted with a preference by law second only to taxes and cost of administration. Those entering into contracts

with employers of labor for manufactured product must contemplate the relation of the labor to the finished product and should be held to know that, in case bankruptcy overtakes the enterprise, the assets resulting from the administration of such trust shall be distributed in the course provided.

Nor does the adoption of this principle destroy the probity of contracts or work greater hardship to secured creditors than would fall unhappily to the lot of that creditor class who live from hand to mouth, if a different construction were adopted. The priority of laborers' claims when they are based upon productive or operating expense of a *quasi* public corporation is a salutary doctrine long established in this country predicated upon the theory of public interest and of public benefit as well as pecuniary advantage to the security holders; the operating expenses of such corporations are recognized by the courts as a first lien on the property of such corporations. *Burnham vs. Brown,* 111 U. S., 776, 4 Sup. Ct., 675, 28 L. Ed., 596; *Southern R. Co. vs. Carnegie Steel Co.,* 176 U. S., 257, 20 Sup. Ct., 347, 44 L. Ed. 458.

What substantial reason would justify any distinction in the protection the law secures to the flagman of the railroad train whose wages are preferred over the interest of the bondholder, and the laborer in the sawmill whose handiwork is a constructive force in the product of the plant, which not only pays the interest on the mortgage, but returns the investment?

That sound legal philosophy established by numerous and powerful decisions of the Supreme Court recognizing the priority of labor engaged in the service of *quasi* public corporations because of

the public convenience and necessity of continued operation, fortunately, is being gradually and wisely extended to the legal preservation of the rights of the laborer whose toil produces the output which pays the interest and enhances the value of the mortgage security. *L'Hote vs. Boyett,* 85 Miss. 636, 38 South. 1; *Dickinson vs. Saunders,* 129 Fed. 20, 63 C. C. A. 666. It should be the policy of the law and the primary duty of society to protect the wages of the laborer in every contingency. Congress has indicated its purpose, and courts should declare the law."

Even where the consequences of an adverse construction would have been less disastrous and far reaching, both this Court and the courts of England have found little difficulty, in proper cases, in avoiding the rule that generally speaking the sovereign is not bound by a statute unless particularly mentioned therein.

In *Greene vs. United States,* 76 U. S., 655, the question arose as to whether an act as to the competency of witnesses in civil actions should bind the United States, in the absence of particular words. It was there concluded that there was no reason why the rule of construction here in question should apply to acts of the legislature which lay down general rules of procedure in civil actions.

Cook County National Bank vs. United States, 107 U. S., 445, was the case of a bill to secure priority to the United States for a balance due to the United States on account of treasury deposits and postal funds, after the application of the proceeds of all securities held

by the United States. In the opinion by Mr. Justice Field, after noting that the language of Sec. 3466 of the Revised Statutes is general and comprehensive enough to embrace the case in hand, it is held in substance that the act authorizing the formation of national banks, by implication takes away the general priority of the United States in case of insolvency. The reason of the case is stated as follows:

> "Everything essential to the formation of banks, the issue, security, and redemption of their notes, the winding up of the institutions and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by the statutory provisions with respect to the settlement of demands against insolvents or their estates."

These provisions, the opinion continues, could not be carried out if the United States were given its general priority under the statute. The banking act gives no preference to any claim except for moneys to reimburse the United States for advances in redeeming notes of the insolvent bank; and provides that the balance shall be ratably distributed "on all claims." In explanation of the position of the Court in holding that a debt due the United States was included in the general words "all claims," the opinion proceeds as follows:

> "The law of 1797 re-enacted in the Revised Statutes, giving priority to the demands of the United States against insolvents, cannot be applied to demands against those institutions (national banks). The provisions of that law and of the National Banking Law being inconsistent and repugnant, the former law must yield to the lat-

ter, and is, to the extent of the repugnancy, superseded by it. The doctrine as to repugnant provisions of different laws is well settled, and has often been stated in decisions of this Court. A law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject the general law were in terms repealed. The question is one respecting the intention of the legislation, and although as a general rule the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet if a particular statute is clearly designed to prescribe the only rules which shall govern the subject to which it relates, it will repeal any former one as to that subject. * * * This view of the banking law is not affected by the subsequent enactment in 1867 of the Bankruptcy Act, giving priority to the demands of the United States against the estates of bankrupts. That enactment was dealing with the estates of persons adjudged to be insolvent under that law, and covers only the distribution of their assets."

In *United States vs. Bank of North Carolina,* 6 Peters, 29, referring to the same question, Mr. Justice Story said:

"The right of priority of payment of debts due to the Government is a prerogative of the Crown well known to the common law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burden and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign prerogative, but is ex-

> clusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal prerogative, may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms."

As held in *United States vs. Hooe,* 3 Cranch., 73, Sec. 3466 of the Revised Statutes was enacted to operate only when insolvency or bankruptcy has been judicially declared. For purely business reasons it was enacted that in case of bankruptcy "the debts due to the United States shall be first satisfied." For like business reasons, with due regard for changed conditions, and an enlightened public policy in harmony therewith, in legislating upon this same subject of bankruptcy through the adoption in 1898 of "An Act to establish a uniform system of bankruptcy throughout the United States," so far as affects the reasonable claims of wage earners, an intent was clearly shown, to abandon the priority theretofore given to claims of the United States, except for taxes, as to which such priority was expressly retained.

Both statutes are upon the same subject, and the former must be held to be repealed by the latter, in so far as they are repugnant, under the rule stated in *United States vs. Tynen,* 11 Wall., 88, as follows:

> "Where there are two acts on the same subject the rule is to give effect to both if possible; but if the two are repugnant in any of their provisions, the latter act, without any repealing clause,

operates to the extent of the repugnancy as a repeal of the first."

Dollar Savings Bank vs. United States, 19 Wall., 239, is the chief stumbling block of the Circuit Court of Appeals. A careful examination of that case fails to disclose in it anything to preclude a court of competent jurisdiction from holding that a right given to a sovereign by statute may be affected by the fair and reasonable implication of a subsequent statute; particularly, where to give such effect to the subsequent statute, better conforms with a just public policy, than to maintain inviolate the right so as aforesaid conferred upon the sovereign.

The Dollar Savings Bank case was an action of debt by the United States against the Bank to recover internal revenue taxes. It was objected that such taxes could be collected only by collector's distraint under his warrant, the remedy provided for in the internal revenue act. This led to a consideration of the rule here in question, as to which the opinion says:

> "It is a familiar principle that the King is not bound by the act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they tend to restrain or diminish any of his rights and interests. * * * The rule thus settled respecting the British Crown is equally applicable to this Government and has been applied frequently in the different States, and practically in the Federal Courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae,* or univer-

sal trustee, enters as much into our political state as it does into the principles of the British constitution."

Enough has been said heretofore to indicate that the application of this broad general rule, depends upon the facts of each particular case. In the *Dollar Savings Bank case,* there was no occasion for any nice discrimination. In fact the Court expressly held that there was not even any reason for the application of the rule to the facts of that case, in view of the fact that the rights of the United States in the premises were affirmatively established by an act of Congress expressly authorizing suits at law to recover unpaid taxes.

It is further submitted that, in the application of the rule in question, there is a plain distinction between cases of sovereign prerogative, and cases where the sovereign power seeks to maintain some position of profit or advantage, conferred upon it by statute, and not essentially an attribute of sovereignty.

As held by this Court, in *United States vs. Fisher,* 2 Cranch., 358, with an opinion by Mr. Chief Justice Marshall, the right of the United States to give to itself priority of payment—

"is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States, or in any department or officer thereof."

The opinion in that case continues as follows:

"In construing this clause it would be incorrect and would produce endless difficulties, if the

opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.

Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.

The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has consequently a right to make remittances by bills or otherwise and to take those precautions which will render the transaction safe.

The claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers.

But this is an objection to the constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative powers of congress extends."

The facts already pointed out that the Bankruptcy Act singles out taxes due to the United States for priority (Sec. 64) specifies taxes levied by the United States among the liabilities from which a bankrupt is not released by his discharge (Sec. 17-1) and desig-

nates the extent to which certain "debts owing to the United States" shall be allowed in bankruptcy (Sec. 57-j) indicate that in drafting this law Congress had in mind claims of the United States against bankrupts. It follows therefore, as held by the Referee in this case, that, *pro tanto,* the Bankruptcy Act is *in pari materia* with the provision of Sec. 3466 of the Revised Statutes relating to payment of claims of the United States against bankrupt estates.

The Revised Statute is accepted to be a continuation of legislation commenced July 31, 1789, by an act giving the United States a preference only in the case of bonds for duties.

In the case of the *United States vs. Fisher,* it was mooted seriously whether the Act of 1797, which has been re-enacted in the Revised Statutes, should be construed to extend to other than revenue cases. It was pointed out by Mr. Ingersoll that the priority claimed for the United States went further than the prerogative of the Kings of England in this particular,

> "at the most liberal period of its juridical history, when unreasonable preferences of the sovereign over the subject fill and deform its every page."

It was decided by the majority of the court, after a careful consideration, not only of the language of the statute, but also of the language and spirit of other statutes, *in pari materia,* that the Act of 1797 extends to debtors of the United States, generally.

Mr. Justice Washington, who took no part in the decision of the cause, filed an opinion in support of the decision of the circuit court of Pennsylvania, which

was reversed by the Supreme Court. Considering the Act of 1797 in the light of the accepted rules of construction, as against the argument for its strict interpretation, the learned Justice said:

"The sovereign may in the exercise of his powers secure to himself this exclusive privilege of being preferred to the citizens, but this is no evidence that the claim is sanctioned by the principles of immutable justice. If this right is asserted, individuals must submit; but I do not find it in my conscience to go further in advancement of the claim, than the words of the law fairly interpreted, in relation to the whole law, compel me. But I do not think that congress meant to exercise their power to the extent contended for. First, because in every other section of the law they have declared a different intent; and secondly, because it would not only be productive of the most cruel injustice to individuals, but would tend to destroy more than any other act I can imagine all confidence between man and man. The preference claimed is not only unequal in respect to private citizens, but is of a nature against which the most prudent man can not guard himself. As to public officers and receivers of public money of all descriptions, they are, or may be known as such; and any person dealing with them, does it at the peril of being postponed to any debts his debtor may owe to the United States, should he become unfortunate. He acts with his eyes open, and has it in his power to calculate the risk he is willing to run.

But if this preference exists in every possible case of contracts between the United States and an individual, there is no means by which any man

can be apprised of his danger, in dealing with the same person."

While the majority of the Court, in view of the plain and unambiguous reference of the act to "any revenue officer or other person hereafter becoming indebted to the United States," was constrained to hold that it extended to debtors of the United States, generally, the considerations advanced by Mr. Justice Washington are of value at this time when it is sought to be justly determined whether or not the harshness of the law has been mitigated.

In the same connection this learned jurist made the following appeal:

> "Do the principles of equity, or of strict justice discriminate between individuals standing *in equali jure* and claiming debts of equal dignity?"

And this he answered,

> "The *nature of the debt,* may well warrant a discrimination; but not so, if the privilege be merely of a personal nature."

There was no answer to the rule of reason, as thus urged, except that it was otherwise written in the law. Now the case is otherwise. The utmost that can be asked for the United States, upon the face of the statutes, is that it be given priority, next after wages. The nature of the claims of wage earners well warrants a discrimination in their favor. Prior to this humane provision of the Bankruptcy Act of 1898, the way to the relief of the needy wage earner was barred. Now it is open; and what has been termed "the most cruel injustice to individuals," tending "to destroy more than any other act I can imagine all confidence between

man and man," need no longer exist as to wage earners. Certainly the reason for assuming that legislation was for the subject, and not for the sovereign, was as cogent under the English law as in this country. And consider with what facility the English jurists avoided the rule. The *Magdalen College case,* 11 Coke's Reports, 66, was an ejectment suit involving the question as to whether or not a perpetual lease from the Master and Fellows of Magdalen College to the Queen, was valid, in view of the statute invalidating leases from the Master and Fellows of any college *"to any person or persons,"* for a longer term than twenty-one years or three lives. It was argued that the Court was bound by the rule that such general terms as "any person or persons" could not be deemed to include the Queen. Yet it was held that the Queen was bound by the statute, although not specially named, because the statute was for the advancement of learning. The reason of the exception was stated as follows:

> "1. The Queen, Lords Spiritual and Temporal, and the Commons who made the said act, have adjudged, as in the preamble appears, long leases made by colleges, etc. to be unreasonable, and against reason (*a fortiori,* an estate in fee simple, etc.) and the law which is the perfection of reason, will never expound the words of an act against reason.
>
> 2. The Parliament has adjudged them causes of dilapidations.
>
> 3. To be the decay of all spiritual livings.
>
> 4. The decay of hospitality.
>
> And 5. The utter impoverishment "of successors incumbents in the same. * * *
>
> And therefore it was unanimously resolved, that general statutes which provide necessary and profitable remedy for the maintenance of religion,

the advancement of good learning, and for the relief of the poor, shall be extended generally according to their words; and God forbid that by any construction, the Queen, who made the act with the assent of the Lords and Commons, should be exempted out of this act of 13 Eliz. which provides necessary and profitable remedy for the maintenance of religion, the advancement of good literature, and the relief of the poor: and out of these colleges Deans and Chapters, etc., as well the church, is furnished with grave and learned divines, for the instruction of Christians in the true religion, as the commonwealth with learned men for the better administration of justice, as well temporal as ecclesiastical, which (sc. religion and justice) are the main pillars which support the King's crown; and therefore of all others, the King who as hath been said is *persona mixta, medicus regni, pater patriae, et sponsus regni,* who *per annulum* is wedded to his realm at his coronation, should not be exempted out of this act by construction of law which would be against reason, and the cause of delapidations, the decay of spiritual livings, of hospitality, of the utter impoverishment of successors, and by consequence the decay of religion and justice would ensue. * * *

So in the case at bar, the law will never make construction against the maintenance of religion, advancement of learning, and sustenance of the poor; it is enacted by the statute of 1 & 2 Ph. & Mar. cap. 8. "That it should be lawful, etc., to give lands, tenements, etc, by feoffment, grant, or other assurance, or by last will and testament in writing, to any spiritual body politic or corporate," notwithstanding the statute of mortmain. One Allaine Clarke seized of certain lands in London in

fee, 4 & 5 Ph. & Mar. by his last will in writing devised them to the Master, Fellows and Scholars of Trinity coll. in Cambridge, and to their successors forever, for the finding of certain poor grammer scholars, etc. And Mich. 8 & 9 Eliz. a great question was moved. 1. That the said college consisted not only of divines but of others also. 2. That the intent was to find grammar scholars, etc. 3. That in the statute of 34 & 35 H. 8 of explanation of wills, bodies politic and corporate are excepted out of it, yet per *opinionem Justiciariorum utriusque Banci at Capitalis Baronis Scaccari;* the devise was held good, and the statute of 1 & 2 Ph. & Ma. (being made for the maintenance of religion, advancement of learning, and exhibition of poor scholars) ought to be favorably expounded, and although the lands were held of the King, yet in such case the said act was expounded to bind the King. * * * * * for the office of the Judge is to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief; and such by-way shall never be left open by construction, although it be for the King's benefit.

The second reason is, that the King shall not be exempted by construction of law out of the general words of acts made to suppress wrong, because he is the fountain of justice and common right, and the King being God's Lieutenant cannot do a wrong, *Solum Rex hoc non potest facere, quod non potest injuste egere,* and therewith agree 13 E. 4. 8. a. and the case of Alton Woods, in the First Part of my Reports, fol. 44 b. 48. a. etc. And although a right was remediless, yet the act which provides a necessary and profitable remedy

for the preservation of it, and to suppress wrong, shall bind the King, as appears in the Lord Berkley's case Pl. Com. 246. If tenant in tail before the statute *De donis conditionalibus* had aliened, either before issue to bar the issue in tail, or after issue to bar as well the donor as the issue in the tail, it was tortious; but no remedy was given for it till the statute *De donis conditionalibus,* * * * * and the Lord Berkeley case was, that land was given to King H. 7 and to the heirs males of his body; and the question was, whether the King, forasmuch as he was not expressly restrained by the act *post prolem masculum suscitatum,* might alien or not? And it was adjudged, that he could not alien, but that he is restrained by the said act for three reasons. 1. Because such alienation before the statute was wrongful, although such wrong wanted remedy; for there it is said, it would be a hard argument to grant, that the statute which restrains men from doing wrong and ill should permit the K. to do it. 2. Forasmuch as the said act is *statutum remediale,* and provides a remedy for this remediless wrong; and that it was necessary and profitable to provide such remedy, it was adjudged, that it should bind the King. 3. Because it was an act of preservation of the possession of noblemen, gentlemen and others, it should also bind the King; and the said act shall not bind the King only when he took an estate in his natural capacity, as to him and the heirs males of his body, but also when he claims an inheritance as King by his prerogative."

It is true that in the case of Bonham, 10 Ch. Div., 595 (1879) where the bankrupt's property had been seized under a writ of extent issued on behalf of the

Crown, while both the legal and the equitable title was still in the bankrupt, it was held that the rights of the Crown could not be affected by the provision of the Bankruptcy Act, under which the title of the assignee in bankruptcy dated back, generally, to an act of bankruptcy anterior to the adjudication, even though it be that the Crown is named in several sections of the Bankruptcy Act. It must be noted, however, that this conclusion is arrived at only after finding, first, that it is not in violation of the principle that the King is bound by an Act of Parliament, "made for the public good, the advancement of religion and justice, and to prevent injury and wrong"; and second, that the provisions of the Bankruptcy Act with regard to the rights of the Crown are not inconsistent with, and in fact have no bearing upon, the right claimed by the Crown in that case.

II. Bearing of the Bankruptcy Act of 1898 upon claims under R. S. Sec. 3468.

If, notwithstanding the arguments heretofore advanced, it should be decided that debts due to the United States are not affected by the Bankruptcy Act, the claim advanced in this case under Sec. 3468 of the Revised Statutes is nevertheless without merit.

R. S. Sec. 3468 reads as follows:

"Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come into the hands of his executor, administrator or assignee are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator or assignee of such surety pays to the United States

> the money due on such bond, such surety, his executor, administrator or assignee shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond in law or in equity, in his own name, for the receipt of all moneys paid thereon."

As pointed out in the opinion of the Referee, page 46 of the Transcript of Record, the Title Guaranty & Surety Company is a "person who by the laws of the * * * United States is entitled to priority;" and all such persons, under the Bankruptcy Act, are subordinated to the claims of wage earners. Therefore, as well stated by the Referee, the question becomes one of interpretation only, and the claims of the wage earners must prevail.

The Circuit Court of Appeals holds that this would not be giving to the surety "the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent * * principal as is secured to the United States," to which it is entitled "on its right of statutory subrogation under R. S., Sec. 3468." The better reason is, that, upon firmly settled principles, the surety is a person whose rights, as originally fixed by R. S., Sec. 3468, were qualified by Sec. 64 of the Bankruptcy Act of 1898, upon the same subject. Looking at the question in a narrow manner, it might be argued that the liability of the bankrupt estate to the United States became fixed at the date of bankruptcy, and passed intact to the surety when it later paid the United States. This argument, however, ignores the established principle that, of two conflicting statutes upon the same subject the latter pre-

vails. It would require an infinitesimal refinement to hold that these two enactments are not upon the same subject.

If the Bankruptcy Act had provided "that no person or persons heretofore entitled to any priority of payment under the laws of the United States in case of bankruptcy or insolvency, shall be entitled to any such priority in the distribution of bankrupt estates," with what show of reason could it be argued that a surety, theretofore entitled under R. S., Sec. 3468, could demand payment at the hands of the bankruptcy court, before the payment of any other claim? Is not the present claimant, under R. S., Sec. 3468, bound by the stronger reason, for that the Bankruptcy Act, in Sec. 64 b (5) expressly recognizes its priority, and merely, from considerations of justice and reason, subordinates its claim to taxes, costs and wages?

In *Mott vs. Maris*, 2 Wash., 196, the Circuit Court allowed the priority of a surety, under the Act of 1799, in view of the bankrupt law of 1800, only on the theory that the sixty-second section of the latter law expressly saved the debt itself from the operation of the law.

III. Effect of failure to file proof of debt within one year from date of adjudication.

Sec. 3468 of the Revised Statutes does not purport to give to the surety any right except the right of priority of payment, with the right to maintain a suit therefor in his own name. Having paid the debt of the bankrupt to the United States, the surety becomes a "creditor," or one "who owns a demand or claim provable in bankruptcy" [B. A., Sec. 1 (9)]. As such "creditor," the surety is subject to the pro-

visions of Sec. 57 n of the Bankruptcy Act, which reads as follows:

> "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: Provided, That the rights of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer."

The section from which this quotation is made covers the whole subject of proof and allowance of claim, including claims of secured creditors, and those who have priority, and claims of the United States.

United States vs. Preston, 4 Wash. (C. C.) 446, was an action on behalf of a surety who had paid the United States and claimed its statutory priority. It was expressly held in an opinion by Washington, J., that the surety does not have the remedies belonging to the United States.

The last mentioned case was followed in *United States vs. Ryder,* 110 U. S., 729, where it was held, that, even if R. S., Sec. 3468 covered the case of a surety on a bond of one charged with committing a criminal offense against the United States (and this the Court said would be against public policy) such surety would not be subrogated to any right of the government other than the bare right of priority. As authority for this position the Court quoted the opinion of Mr. Justice Washington to the effect that "the

only advantage which the law gave to the surety was that of priority over other creditors, and not in form and modes of proceeding."

This is the only position consistent with reason. Statutes of limitation do not run against the government, without express words, not for any reason of prerogative, but because public policy forbids that the government should suffer by the neglect of its officers. There is nothing in this doctrine to condone the neglect of a surety.

While the surety did not pay the United States until after the expiration of the year allowed for proofs of debt, it well knew its liability, and could have filed its proof in the method wisely provided by this Court in General Orders XXI.-4.

In *Hutchinson vs. Otis,* 190 U. S., 553, it was held that a proof of debt filed within a year may be amended after the year has expired. There is nothing in that case to indicate that it should be held the equivalent of the filing of an amendable proof, for the surety upon the bond of a bankrupt to notify the trustee in bankruptcy that a demand has been made upon the surety, under the terms of the bond.

The liberality of the courts in the matter of amendments, which, in the case of *Kessler,* 25 A. B. R., 512, led the Circuit Court of Appeals for the Second Circuit to extend the doctrine of *Hutchinson vs. Otis, supra,* to cover a case where the creditor filed no claim of any sort after bankruptcy, but before bankruptcy handed an ordinary, unverified statement of account to an assignee of the debtor, who, after bankruptcy, handed the same to the debtors' trustee, this liberality can not properly be stretched to cover the present case. Here within the year, it is true, the surety notified the trustee

that it had been sued by the United States upon its bond given for the bankrupt, but at no time did it claim to be entitled under the Bankruptcy Act. On the other hand, it designedly refrained from presenting any claim in bankruptcy. It argued that it was not affected by the Bankruptcy Act. It waited until distribution was ordered, and then came in with its petition (Transcript of Record, page 16) and asserted its subrogation to the rights of the United States. It also filed its exceptions to the decree of distribution (Transcript of Record, page 40) in which it asserted that it was not subject to the provisions of the Bankruptcy Act as to order of distribution of assets. The position of the surety can be sustained only by holding, first, that debts due to the United States are not in anywise affected by the Bankruptcy Act, and second, that the surety is subrogated not only to the right of payment, but also to every prerogative connected therewith. If, on the other hand, this surety is included within the designation, "any person who by the laws of the States or the United States is entitled to priority" [Sec. 64b (5)] then it has lost its right to distribution by disavowing the protection of the Act. This is within the familiar principle that a litigant can not shift his ground in the appellate court. Notice that the claimant was pressing a claim in derogation of the Bankruptcy Act, was not notice of a claim under the Act. If the claimant has failed to show that its rights are not affected by the Bankruptcy Act, upon what theory can it be heard to ask that its claims be treated as proofs of debt under the Act, and moreover, to what effect in this proceeding, as, *ipso facto,* its claim would become subordinated to wage claims?

IV. Liquidation by Litigation.

The proof of debt was filed in time if the claim of the surety be deemed to have been liquidated by litigation within the meaning of Sec. 57 n of the Bankruptcy Act, *supra*. But in no sense does the litigation that existed in the present case come within the meaning of that term as used in the section in question.

The cases bearing upon this provision of the Act have recently been reviewed in the case of *Standard Telephone & Electric Company*, 26 A. B. R., 601 (D. C.). In the main case, and in all of the cases cited, the litigation held to be within the meaning of the section, was litigation between the creditor and the bankrupt estate. The leading case cited was *Powell vs. Leavitt*, 150 Fed., 89 (C. C. A.) in which it was said:

> "The phrase 'liquidated by litigation' is general and the object of the exception which is made to the statutory limit of time is plainly to allow the proof of a claim after the expiration of a year by a creditor who, during that time was engaged in litigation with the bankrupt's estate concerning its liability to him."

In the case of *Thompson*, 123 Fed., 174, 10 A. B. R., 581, it was squarely held by the District Court for the Eastern District of Pennsylvania, that litigation between the bankrupt's surety and the principal creditor, to determine the liability of the surety, was not within the meaning of the section here in question. As there indicated, if the surety desires to await the outcome of his litigation with the principal creditor, he may make his proof in accordance with Sec. 57-i of the Bankruptcy Act.

The Bankruptcy Act is intended to provide for a prompt liquidation and distribution of the estate of an insolvent. It is contrary to its spirit as well as its letter to say that persons to whom the estate is contingently liable are excepted from the requirement that proof of debt must be filed within a year. The reason for this requirement fails when the creditor is in litigation with the bankrupt estate. On the other hand, the reason remains in full force where the bankrupt estate is not a party to the litigation. The Act allows the principal creditor to file his claim, and both the Act and the General Orders provide for the filing of a claim by any person contingently liable. Where, as here, a claim exists against a bankrupt estate, with no dispute as to its validity or amount, is the rule to be laid down that no one need file a proof of debt because a principal creditor is indifferent, and a surety assumes not to be a creditor until it has paid the debt?

Respectfully submitted,

R. T. M. McCready,
Attorney for Appellant.

Addendum.

R. S., Section 3466:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankrutpcy is committed."

Supreme Court of the United States

OCTOBER TERM, 1911.
No. 188.

GUARANTEE TITLE & TRUST COMPANY, Trustee in Bankruptcy of PITTSBURGH INDUSTRIAL IRON WORKS, Bankrupt, Appellant,

vs.

TITLE GUARANTEE & SURETY COMPANY.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF OF APPELLEE.

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Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Counter-Statement of the Case.

The appellee does not controvert the statement of the case as made by the appellant, but desires to call the attention of the court to the fact as shown on pages 35, 36 and 37 of the Record, that while it is true that in the suit of the United States against the appellee in the District Court of the United States for the District of Delaware that judgment was entered for want of a plea, it is also true that a jury was duly sworn, inquisition duly had, and proof of its claim was submitted by the government to this jury, which found in favor of the government against the surety company, upon which finding final judgment was entered for the amount properly

due the government by reason of the breach of the bankrupt's contract together with proper interest and costs.

The appellee makes this statement in justice to itself to show that there was no supine neglect, nor was there any hardship suffered by the bankrupt's estate or its creditors by reason of the judgment for want of a plea.

Argument.

The Specification of Error permits the consideration of this case from the same three standpoints as the case was argued in the Circuit Court of Appeals by the present appellee, who was the appellant in that Court, viz:

(1) On the Right of Priority of the Claims of the United States, against Insolvent Estates.

(2) On Liquidation by Litigation, under the Bankruptcy Act.

(3) On the Suretys Right to Subrogation to the Rights of the Government.

ON THE RIGHT OF PRIORITY.

Both at Common Law and by Statute the Government's Claim Has Priority in the Distribution of the Estates of Insolvents.

As correctly stated by the appellant, "The important question in this case is whether or not claims of the United States against a bankrupt are affected by the Bankruptcy Act." To which should be added, "including in the question the right of the bankrupt's paying surety to subrogation to the prerogative right of the government."

The appellee's answer to this question is that neither the rights of the government, nor those of the surety paying the insolvent's debt to the government, are in anywise affected by the Bankruptcy Act, which here serves only as a vehicle to bring the fund into court, and to furnish a custodian therefor.

The claim to these rights is based upon sections 3466 and 3468 of the U. S. Revised Statutes (Act of March 2, 1799, Chap. 22, 1 Statute, L. 676), which are as follows:

Section 3466:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3468:

"Whenever the principal in any bond given to the United States is insolvent, or whenever such principal, being deceased, his estate and effects which came to the hands of his executor, administrator or assignee, are insufficient for the payment of his debts, and in either of such cases *any surety* on the bond, or the executor, administrator or assignee of such surety pays to the United States the

money due on such bond, such surety, his executor, administrator or assignee shall have the *like priority* for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond in law or in equity, in his own name, for the recovery of all moneys paid thereon."

Section 64 of the Bankruptcy Act of 1898 prescribing debts which have priority in payment is in substance as follows:

64 (a) All taxes due United States, State, county and other municipal sub-divisions.

(b) (1) Cost of preserving estate.

(2) Filing fees and cost of expense of recovery of Bankrupt's property.

(3) The cost of administration, etc.

(4) Labor claims.

(5) "Debts owing to any person who by the laws of the States or the United States is entitled to priority."

Under Sections 3466 and 3468 of the Revised Statutes above quoted the rights of the surety to have its debts first satisfied out of the funds in the hands of the trustee would seem to be unquestionable; but the appellant says that these Sections are abrogated by the Bankruptcy Act of 1898, first, by what it does not say, and second, by what it does say.

In the first place, it appears that all prior bankrupt acts, viz., 1800, 1841 and 1867, in the sections providing for priority of payment in distribution, provided:

FIRST. That *debts* and taxes due the United States, any state or other political sub-division, should be first

paid, whereas the Act of 1898 in the corresponding section (64 of the Act) omits the word "debts," which omission, it is argued, indicates the legislative intent to waive the right of the United States to have its claim first satisfied.

It is respectfully submitted that the omission of the word "debts" from sub-section (a) is not an indication that Congress wished to relinquish the Government's right of priority in payment of debts due the government but that it desired to maintain the proper distinction between that class of claims, including taxes and other contributions toward the maintenance of the functions of national, state and municipal government, which being in no sense "debts," cannot be proved as such, and are not affected by a discharge; and that class of claims included in sub-section (b) which, aside from those incidental to the bankruptcy proceedings, being debts, must be proved as such and are affected by a discharge.

SECOND. As to what the statute does say: Clause (b) (4), of the priority section (64), coming after the enumeration of the first three classes entitled to priority in payment, gives wage and labor claimants priority next in order, and clause (5) provides that all other persons whose debts are by the laws of the United States or any state given priority, shall next be paid.

The appellant contends that this latter provision, viz: clause (5) applies to the debt of the United States, and consequently to the debt of the surety in the present matter; that is, that the term "person" as used in clause (5), includes the United States the same as any individual or artificial person would be included. And the brief of counsel for the trustee appellant indicates a deep and thorough investigation of ancient precedents

in his attempt to overthrow the firmly established rule which may be stated in the following language:

The rule is that neither the United States nor any other sovereign is included by the general language of any statute, and is not bound by the provisions of any insolvent law, unless specifically mentioned therein.

This was always so ruled under the various insolvent and bankrupt acts in England and the doctrine has been repeatedly affirmed in the United States.

Dollar Savings Bank vs. U. S., 19 Wall., 239;
U. S. vs. Herron, 20 Wall., 251, 260;
U. S. vs. Lewis, 92 U. S., 618.

In this last case, as though by way of anticipation to the appellant's contention that the absence of the word "debt" in clause (a) of the priority section indicates the legislative intent to waive the priority rights of the government, the Court, Mr. Justice Swayne, on page 622, says that this provision is in *pari materia* with the several acts giving priority, and that it was doubtless inserted in the bankruptcy law (1867) "to recognize and reaffirm the rights which those statutes give, and to exclude the possibility of a different conclusion."

After citing this case and quoting the language just given, the court below, Buffington, J., in the case at bar say, see page 59 of the Record:

> "Presumably with this decision before it Congress passed the present Act and in the light thereof, the omission, in the Act of 1898, of words expressly giving priority to debts due the United States, had no more significance than the presence

of such words in the Act of 1867. In either case the statute did not affect the rights of the United States under R. S. section 3466 to lessen them in any respect. In the absence of any such express provision in the bankrupt law we cannot inject one into it by construction, for, as said in *U. S. vs. Herron,* 20 Wall., 251, 'Sanctioned as that principle is by two express decisions of this court it would seem that further discussion of it is unnecessary, as it has never been questioned by any well considered case, State or Federal, and is founded in the presumption that the Legislature, if they intend to divest the sovereign power of any right, privilege, title or interest, would say so in express words; and when the Act contains no words to express such intent, that it will be presumed that the intent does not exist.' "

The case of *Fink vs. O'Neil,* 106 U. S., 272, cited and quoted at some length in the appellant's brief, is not in point.

There a statute of the State of Wisconsin exempting homesteads from execution was under consideration, on demurrer to a Bill in Equity to restrain an U. S. Marshal from selling an exempted homestead on a writ of *fieri facias* at the suit of the Federal Government. This exemption statute was passed in 1878 in compliance with the mandate of the state constitution, declaring in the Bill of Rights that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws."

The sixth section of the Act of Congress of June, 1872, c. 255 (then section 916 R. S.), provided that "The

party recovering judgment in any common law cause in any Circuit or District Court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes, *by the laws of the State,* in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or District Courts; and such courts may from time to time by general rules adopt such state laws as may hereafter be in force in such state, in relation to remedies upon judgments as aforesaid, by execution or otherwise."

The Supreme Court, by Mr. Justice Mathews, after considering, *inter alia,* the statutes above quoted, on page 279, says:

> "It is further to be observed that no distinction is made in any of these statutes on the subject between executions on judgments in favor of private parties and on those in favor of the United States. And as there is no provision as to the effect of executions at all, except as contained in this legislation, it follows necessarily that the exemptions from levy and sale, under executions of one class, apply eqaully to all, including those on judgments recovered by the United States,"

and later in the same paragraph:

> "Besides, as was said by Mr. Chief Justice Marshall, in *Wayman vs. Southard* (in considering an earlier statute of the same character), 'this section provides singly for issuing the writ, and prescribes no rule for the conduct of the officer while obeying its mandate.'"

and further:

> "As the statute of Wisconsin, exempting homesteads from levy and sale upon executions, was in force at the time the act of Congress of June 1st, 1872, c. 255, took effect, and has remained so continuously from that time, it also follows that the exemption has thereby become a law of the United States within that state, and applies to executions issued upon judgments in civil causes recovered in their courts in their own name and behalf, equally with those upon judgments rendered in favor of private parties."

and on page 280:

> "This conclusion cannot be avoided by the consideration which has been urged upon us, that the process acts do not limit the sovereign rights of the United States, upon the principle that the sovereign is not bound by such laws, unless he is expressly named. These laws are the expression of the sovereign will on the subject, and are conclusive upon the judicial and executive officers to whom they are addressed; and as they forbid the issue of an execution in every case, except subject to the limitations which they mention, and as there is no authority to issue an execution in any case whatever, except as conferred by them, the sovereign right invoked is left without the means of vindication. The United States cannot enforce the collection of a debt from an unwilling debtor, except by judicial process. They must bring a suit and obtain a judgment. To reap the fruit of that judgment they must cause an execution to issue. The Courts have no inherent authority to take any one of these steps, except as it may have been by the legislative department; for

they can exercise no jurisdiction, except as the law confers and limits it. And if the laws in question do not permit an execution to issue upon a judgment in favor of the United States, except subject to the exemptions which apply to citizens, there are no others which confer authority to issue any execution at all. For, as was said by Mr. Justice Daniel, in *Cary vs. Curtis,* 3 How., 236, 245, 'the courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.'"

It would be fruitless for counsel for appellee to try to improve upon the language of the court just quoted in an attempt to distinguish between that case and the cases of the *Dollar Savings Bank vs. U. S., U. S. vs. Herron* and *U. S. vs. Lewis, supra,* for the case of *Fink vs. O'Neil* involves nothing but the construction of a statute providing an uniform procedure in the United States Courts, and there is no question of governmental prerogative under an insolvent or bankrupt law, and further it will be remembered that the debtor's exemption statute was passed in compliance with the mandate of the people as expressed in their constitution.

In *Dollar Savings Bank vs. U. S.,* 19 Wall., on page 239 the Court, by Mr. Justice Strong, says:

"It is a familiar principle that the King is not bound by any act of Parliament, unless he be named therein by special and particular words. The most general words that can be devised (for example, any *person* or *persons,* bodies politic or corporate) affect not him in the least, if they may tend to

restrain or diminish any of his rights and interests * * *

The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently to the different states, and practically in the Federal Courts. It may be considered as settled that so much of the royal prerogative as belonged to the King in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution."

For definition of "persons" as given by the present Bankrupt Act see page 35 of this argument.

Clause 5 of Section 5101 (the distribution section) of act of 1867 is substantially the same as clause 5 of section 64 b of act of 1898, and under the act of 1867, in *U. S. vs. Herron*, 20 Wallace (U. S.), 251, the Court say that the general terms "creditor or creditors" cannot be said to include the government, and holds that no general words in a statute divest the government of the rights or remedies. See language of the Court to the same effect in *Lewis vs. U. S., supra.*

It is therefore respectfully submitted by the surety appellee that sections 3466 and 3468 are still operative, and in support of this we cite the following authorities, which state that while the point is as yet unadjudicated (until the decision of the case at bar by the Circuit Court of Appeals), in their opinion the right of the United States to priority under the act of 1799 is still in force and unaffected by the bankruptcy act of 1898.

Collier on Bankruptcy (Edition of 1899) in his note to Section 64 of the bankruptcy act, on page 367, says as to section 3466, U. S. R. S.:

> "Is this section impliedly repealed by the provisions of the bankruptcy act? We think not. It is true that paragraph (a) of the section under consideration provides for the payment of taxes due to the United States and to states and other political divisions, prior to the payment of dividends, but this is hardly sufficient to justify the inference that as to other claims the United States has no priority."
>
> "The well recognized principle that a statute is not to be construed as limiting the prerogative of the sovereign, and that the sovereign is not affected by the provisions of a statute unless expressly so declared, necessitates the belief that the section of the Revised Statutes above quoted is still in force, and that debts due to the United States have a priority over all claims other than taxes."

The author then quotes from *United States vs. Lewis,* 92 U. S., 618, and *U. S. vs. Herron,* 20 Wallace, 251, in support of this view.

And in the 7th Edition (1909) Page 728 and 8th Edition (1910) the same author says:

> "DEBTS DUE THE UNITED STATES.—These are entitled to priority of payment. This follows from Section 3466 of the Revised Statutes, though the words are somewhat general. It even seems that the United States need not prove its debt, and that the doctrine of *laches* does not apply any more than to any other sovereign. Hence Section 3467, which makes the trustee personally liable, if, with notice,

he fails to pay a debt due the United States. Being a debt, the order of payment is probably next after taxes, which are not debts, cannot be proved as such and are not affected by a discharge. This doctrine is ancient, and, even in the absence of statutory provisions, would probably be enforced, the sovereign not being affected by the provisions of a statute, unless an intention so to do therein appears." (The edition of 1910 refers to decision of case at bar by the Circuit Court of Appeals, 174 Fed. Rep., 385.)

In *Eng. & Amer. Ency. of Law*, Vol. 29, page 155 (1904), under the title United States—Prerogatives, in referring to Bankruptcy Act of 1898, the editor says:

"Construing the Act as a whole, it can hardly be question that Section 3466 of the Revised Statutes of the United States is still in force, although the point is yet an unadjudicated one."

Brandenburg on Bankruptcy, 3rd Edition, says:

"Section 1011. United States entitled to priority.—The present law as the Act of 1867, specifically provides that taxes due the Federal, state or municipal governments shall be entitled to priority of payment, but, unlike the former, the present law so far as the government is concerned, provides for priority of taxes only. This provision, however, is not to be considered as superseding, or in anywise limiting, sections 3466 and 3467 of the Revised Statutes, but is to be construed as supplementary and in *pari materia*, doubtless being inserted in the present law merely to recognize and reaffirm the right which those sections gave to exclude the possibility of a different conclusion. Under the general rule of interpreting statutes in de-

rogation of public rights, a repeal will not be implied but must be in express terms, hence the above-mentioned sections of the Revised Statutes cannot be considered to be affected by the present law, or by the act repealing the bankruptcy law of 1867. Consequently, while taxes only are mentioned in the present law, any debt, demand or claim which the United States may have against the insolvent, will be entitled to priority of payment under section 3466, which provides that the debts due the government must be first satisfied out of the estate of an insolvent, and this right of priority extends as well to the cases in which a debtor, not having sufficient property to pay all of his debts, makes a voluntary assignment, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

"The United States may prove their claim and assert their priority in the proceedings in the bankruptcy court, but as in the absence of a specific provision they are in nowise bound by a bankruptcy law, it has been held that they are under no obligations to do so, and hence may be considered as standing in the category of creditors who are not affected by the proceedings unless specifically mentioned."

"Section 1012. Liability for ignoring priority of United States.—It is provided, however, that every trustee or other person, who pays any debt due by the person or estate from whom, or for which he acts, before he settles and pays the debts due the United States from such person or estate, becomes answerable in his own person and estate for the debts so due to the United States, or for so much

thereof as may remain due and unpaid. The assignee becomes a trustee for the United States, and is bound to pay its debt first out of the proceeds of the debtor's property. If, therefore, he has notice of the existence of the debt of the United States, he cannot escape personal liability for its amount, to the extent of the value of the assets that come to his hands, if he fails to provide for it before making distribution to other creditors. Such is the rigor of the statute that he cannot invoke the judgment of a court of competent jurisdiction directing him to distribute the assets to specified creditors as a justification, when it does not appear that the United States were a party to the proceedings, or that he took proper measures to secure the priority of the United States in the distribution. Although it has been held that this right of priority must be asserted, and the failure of the government with full knowledge of the adjudication to make claim before final settlement, waives such right and leaves no ground on which to hold the trustee responsible out of his own means; this overlooks the fact that laches, however gross, cannot be imputed to the government.

"Section 1013. In What Cases.—The provisions of the law giving priority to the United States in cases of insolvency, now embodied in sections 3466 and 3467 of the Revised Statutes, originated in the Act of Congress of 1797, as supplemented by the Act of March 2, 1799, and have frequently been considered by the courts. It is established by many adjudications, in which the meaning and effect of these provisions have been discussed, that such priority extends to all classes of debts, whether liquidated or unliquidated, joint or several, legal or

equitable, whether payable at present or in the future; and when the insolvent debtor has made a voluntary general assignment, or committed an act of bankruptcy, that such priority extends to all his estate which comes to the hands of his trustee or assignee. Thus they are entitled to priority of payment of penalties for violation of the revenue or other laws and the claim of the government against a firm is joint and several and is entitled to priority out of either the joint or several estates. It has also been held that if a person purchases imported articles free of duty and is compelled to pay the duty, to get possession of the article, he is entitled to be subrogated to the priority of the United States, which is also true when an official pays to the government the amount of a dishonored check received by him from a government debtor, he is entitled to be subrogated to the rights of the United States against such debtor. Furthermore, this right of the United States to priority is independent of any securities which it may hold.

"Section 3466 R. S. does not give the United States a lien, but only a priority of payment out of the property or estate of its insolvent debtor, after it has passed by a voluntary assignment, or by operation of law, to a third person for the benefit of creditors, or with the intent to defeat such priority, and this priority will attach and prevail against judgments, but subject to all prior valid liens thereon."

Remington on Bankruptcy, section 2190, says that section 64 (a) of the Bankruptcy Act "specially provides the priority for taxes and therefore takes precedence over the general provisions of clause 5 of paragraph (b)."

And in section 2191, he says "damages suffered by the United States Government are given by the Federal Statute priority of payment out of the funds in the hands of assignees, trustees in bankruptcy, executors, administrators, etc., in charge of insolvent estates. Thus where a contractor for supplying the government with paper becomes bankrupt the damages suffered by the government have priority of payment in bankruptcy."

Citing *In re Stoever,* 127 Fed. Rep., 394.

This case is decided specifically upon the grounds contended for in the case at bar, that is on the priority of the government under section 3466 of the Revised Statutes irrespective of the Bankrupt Act.

And in Section 2192, "claims of the United States entitled to priority must be paid even without the filing of a proof of claim. It has even been held that the trustee takes his own risk in paying out of the funds without taking care of such claims."

Citing *In re Stoever, supra,* to which we add the case of *U. S. vs. Barnes,* 31 Fed. Rep., 705.

And in section 2193, "limitation of one year for the proof of claims in bankruptcy does not apply to the claims of the United States government."

Citing *In re Stoever, supra.*

In the 1910 Supplement, Remington, in section 2191, discusses very fully the case at bar as decided by the Circuit Court of Appeals.

It is not to be inferred that Congress in revising and consolidating the statutes intended to change their effect unless an intention to do so is clearly expressed.

Logan vs. U. S., 144 U. S., 302;
U. S. vs. Ryder, 110 U. S., 129.

In *United Shoe Company vs. Duplex Shoe Co.*, 133 Fed., 933, the Court say:

> "It is a well-known rule of construction that no statute alters the settled law further than its words import."

Citing, *inter alia*:

U. S. vs. Ryder, supra.

In that case on a recognizance conditioned that principal, "should appear in person at Trenton before the United States District Court there, and submit to such sentence as the said court should order and direct," the principal absconded, and on payment of amount of bond the sureties brought a bill in the name of the United States to reimburse themselves out of the property of principal in hands of Ryder.

Held, that sec. 3468 of U. S. R. S., under which the present claim of subrogation is made, *does not apply to recognizances in criminal proceedings*, and does not authorize an action in the name of the United States, as the statute only authorizes bringing of suit in surety's own name.

Mr. Justice Bradley, on page 735, after referring to text books and opinions, says:

> "The doctrine is that a surety paying the debt for which he is bound is not only entitled to all the

rights and *remedies* of the creditor against the principal for the whole amount, but against the other sureties for their proportional part. This is clearly the rule where the principal obligation is the payment of money or the performance of a civil duty, and in England the sureties of a debtor to the king (as for duties, taxes, excise, etc.) have always, since the Magna Charta at least, had the right, upon paying the debt, to have the benefit of prerogative process such as extent, or other Crown process, adapted to the case to aid them in coercing payment from the principal, and compelling contributions from co-sureties."

An examination of that case shows that subrogation was sought to the rights of the United States upon a forfeited recognizance conditioned that the defendant in a *criminal* proceeding should appear at a certain time and place, and while it is true that the surety claimed subrogation under Section 3468 of the Revised Statutes, *the right was denied rather on the ground of public policy than as a denial of the right of subrogation to sovereign prerogatives.* The law has always denied that there was any implied contract on the part of a bailed person to indemnify the person who became bail for him.

As Bradley, J., on page 737, points out, subrogation to the right of Government in such a case would be a subversion of the very purpose of the recognizance, viz., the surrender of the principal to justice. He says:

> "It would be as though the government should say to the bail, 'We will aid you to get the amount of your recognizance from the principal so that you may be relieved from your obligation to surrender him to justice.'"

We call the Court's attention to the language of this Court in the case of *Cook County National Bank vs. United States,* 106 U. S., 445, construing the act authorizing the formation of National Banks, quoted on page 25 of Appellant's brief, viz: "The law of 1797, re-enacted in the Revised Statutes (Sec. 3466), giving priority to the demands of the United States against insolvents cannot be applied to demands against those institutions." Thus specifically recognizing the rule of the priority of the Government against insolvent estates, for which rule appellee contends.

That the appellant is in grave error in contending that Section 64 b, Clause 5, of the Bankruptcy Act is in *pari materia* with sections 3466 and 3468 of the Revised Statutes we submit the following:

Words and Phrases Judicially Defined says (Vol. 4, page 3478), quoting from *State vs. Gerhardt,* 44 N. E. 469:

> "The phrase 'statutes in *pari materia*' is applicable to private statutes or general laws made at different times, but in reference to the same subject. Thus the English Laws concerning paupers and their bankruptcy act are construed together as if they were one statute and as forming a united system."

And further on the same page this work says:

> "Consistent statutes relating to the same subject are called statutes *'in pari materia'* and are treated and construed together as though they constituted one Act."

Nor is the appellant wanting in authority for his position, as the Court in *In re Stoever,* 127 Fed. Rep., 394, held the same way. There the right of the Government's priority was conceded, but the court, citing the case of *Lewis vs. U. S.,* 92 U. S., 622, where the Court held that the Bankruptcy Act of 1867, which immediately after the payment of fees, costs and expenses provides for the payment first of all debts due the United States was in *pari materia* to the Revised Statutes, sections 3466 and 3468; and proceeds to hold that section 64 b (5) is likewise in *pari materia.*

How, under the accepted meaning of in *pari materia,* can this section of the Act of 1898 be so construed?

Let us examine the legislation which the Court considered as being in *pari materia* in *Lewis vs. United States, supra.*

On the one hand was the Act of March 2nd, 1799, which later became Sec. 3466 of the Revised Statutes, hereinabove quoted on page 3; on the other hand we have the Bankruptcy Act of 1867, which providing for the payment of dividends, gives priority or preference as follows:

> "FIRST. Fees, costs and expenses of suits and of the several proceedings under this Act, and for the custody of property as herein provided."
>
> "SECOND. All debts due to the United States and all taxes and assessments under the laws thereof;" and * * * *
>
> "FIFTH. All debts due to any person who by the laws of the United States are or may be entitled to a priority or preference in like manner as if this Act had not been passed."

As "fees, costs and expenses" are not "debts due" from the insolvent, they do not affect the proposition.

It is this second provision which the Court, in *Lewis vs. United States,* say is in *pari materia* with the Acts giving priority to the United States, "and was doubtless put in to recognize and *reaffirm* the rights, which those statutes give, and to exclude the possibility of a different conclusion."

The definitions above given show that statutes to be in *pari materia* must be "consistent;" that they "are treated and construed together as though they constituted one Act;" and that they "are to be construed together as if they were one statute, and as forming a united system."

This second provision of the Act of 1867 is clearly within all of these requirements. But how can the same be said of Sec. 64 b (5) of the Act of 1898? It is not consistent with Sec. 3466, and this inconsistency could not be better illustrated than in the present case, where the application of the old statute clearly gives the Government its priority, and under Sec. 3468 the claimant surety its entire claim, while the application of the Bankruptcy Act gives priority in an entirely different direction. Putting these two sections into one statute (for, if in *pari materia, they must be construed as if so situated*), is it conceivable that a court would say that both could stand, if "person" in the Bankruptcy Act is to be applied to the Government and in the face of the well settled rule that the Government is not concluded by any general words in a statute, and that bankruptcy and insolvent laws do not

affect the sovereign unless specifically mentioned therein?

It will be noted that "Fifth," in order of preference in the Act of 1867 is identical with 64 b (5) of the Act of 1898, except that the latter includes priorities allowed by State statutes.

This we contend, when considered in the light of the cases above quoted construing the Act of 1867, is further indication of legislative intent not to regard the United States a "person" within the meaning of Section 64 b (5).

LIQUIDATION BY LITIGATION.

Appellee's Claim is Within the Exception to Section 57 n of the Bankruptcy Act, Requiring Filing of Proof of Debt Within One Year from Date of Adjudication.

Appellee's claim was "liquidated by litigation" and comes within the exception of Section 57 n of the Bankruptcy Act, which reads as follows:

> "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: PROVIDED, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer."

The appellee contends that the District Court erred in sustaining the position of the Referee, who holds, as will appear from his report and opinion, on page 43 of the Record, that because the litigation was between the United States and the claimant, and not between claimant and bankrupt, it is not a "litigation" within the meaning of Section 57 n of the Bankrupt Act, and in support of his position cites *In re Thompson,* 10 Am. B. R., 581, 123, Fed. Rep. 174.

It is true that the text books indicate that the case does decide that litigation between the claimant and a third party, but to which the bankrupt was not a party, is not "litigation" within the meaning of section 57 n of the Act, *but an examination of that case shows that the court does not so decide.*

In that case the Bankrupt Company had sub-let certain premises from E. O. Thompson, who, of course, continued liable to the original lessor, thus occupying the position of surety for the payment of the rent due from the bankrupt. Thompson having died, his executors within the year filed a proof of claim against the bankrupt estate, which was subsequently withdrawn without any reservation. The landlord secured allowance of his claim for rent against Thompson's estate in the Orphans' Court. Executors then presented a new proof of claim, which was received by the Referee on the theory that the first claim had been withdrawn for the purpose of substituting an amended claim. To this ruling the trustee objected on the ground that the proof was filed after the termination of the period allowed by the act. The Court disallowed the claim upon the sole ground that it was filed too late.

The only reference to the fact that the litigation was not directly with the bankrupt is found in these words in the opinion:

> "If the litigation there referred to means litigation between the claimants and the bankrupt, no such dispute existed; and assuming it to include litigation between the claimants and third parties by which the bankrupt estate may be affected, although it is not represented therein, the object of the contest between the owner and the claimant was not to liquidate a claim."

It will therefore be seen that this case *does not decide* that litigation to which the bankrupt is not a party, (although affecting claims against his estate), is not litigation within the meaning of Section 57 n of the Act, although the case is cited in the textbooks and has been cited by the appellant, on page 45 of his Brief and by the referee as such authority.

Section 57 n is new, and aside from the *Thompson Case, supra,* there is no authority for the restricted construction given it by the Referee, and, as shown, that case is not such authority.

An examination of the cases will reveal that while section 57 n is construed by the Courts as a provision to facilitate the administration and distribution of the bankrupt estate, it is to be construed, as are all remedial statutes, in a broad sense, and *where those in charge of the administration of the estate have notice of the claim,* as in the case at bar, where no one is prejudiced, and the determination of liability is delayed by litigation, the courts are uniformly disposed to give the creditor the benefit of the liberal construction of this section.

In *Hutchinson vs. Otis,* 8 Am. B. R., 388, 115 F. R., 937, the case came on before the Circuit Court of Appeals, First Circuit, on appeal from an allowance of a claim filed more than a year after adjudication. In that case the court, Putnam, C. J., in refusing to sustain the appeal, with reference to this section, says on page 942:

> "If the statute is to be considered in the same spirit in which other remedial statutes are, and not in the literal way, there might be reason for holding that this provision extending the time for proof with reference to claims 'liquidated by litigation' reaches every case in which a question arises and which comes into a judicial tribunal within the year limited, if the question, in any manner, involves the determination of the net amount for which the claim shall be finally allowed."

This case was affirmed by this court in 190 U. S., 552, as cited by counsel for appellant on page 43 of his brief and the liberal interpretation of section 57 n by the Circuit Court of Appeals for the First Circuit was approved by Mr. Justice Holmes on pages 554 and 555.

In *Re Keyes,* 20 Am. B. R., 183, 160 Fed. Rep., 763, the court held that while a bill in the state court to determine the validity of a bill of sale from the bankrupt to the petitioner

> "did not in terms relate to the amounts due the creditors, yet since the account liquidated necessarily involves the determination of the net amount for which their claims shall be finally allowed, I think the claims are to be considered as 'liquidated by litigation' within the meaning of section 57 n."

In *Powell vs. Leavitt, in re Noel,* 18 Am. B. R., 10, 150 Fed. Rep., 89, cited by Counsel for appellant on page 45 of his brief, a claim secured by a mortgage on a bankrupt's stock in trade was attacked by the trustee as a preference, whereupon the creditors sued in the state court to establish the validity of the mortgage, in which action the mortgage was held to be invalid as a preference.

The court held that the creditor's claim was thereby liquidated by litigation and provable as an unsecured claim within sixty days after the rendition of the judgment in the state court as provided by the Act.

Here was a chattel mortgage for a sum certain, which amount was known as well at the beginning of the litigation, which was within the year period as it was known at the termination of the litigation.

On page 91 of the *Federal Reporter* the court say:

> "Notice of the claim is given in effect by the litigation, and if the creditor is not to be deprived of his proof altogether there seems to be no good reason why he should not offer it immediately after the litigation is ended * * *."

And further,

> "to hold that Powell's claim was liquidated by litigation in the proceeding which for some purposes determined the amount for which it should be allowed is not, we think, a forced construction of the language of the Act. It is rather that 'honest and practical interpretation which we declared should be applied to statutes in bankruptcy;"

Citing

Beatty vs. Anderson Coal Mining Co. (C. C. A.) 150 F. R., 293.

Powell vs. Leavitt is the case in which the court holds that the provision of this section as to filing the claim when liquidated by litigation, if the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment, as though it read

> "if the final judgment therein is rendered within thirty days before the expiration of such time or at any time thereafter."

The Court in the same case, on page 91 of 150 *Federal Reporter,* says:

> "It may be that pending the litigation he could have proved his claim in bankruptcy as a secured claim, leaving his proof to be amended in case his mortgage was avoided (citing authorities), *but to prove during litigation a claim which cannot be allowed unless the creditor, fails in the litigation is but an empty formality."*

In this case the Court also quotes with approval the language above quoted in the case of *Hutchinson vs. Otis* as to the liberal construction which this section should receive.

So in the case at bar, it would seem to have been an empty formality to prove during litigation a claim which could not have been allowed until after judgment against the surety and full satisfaction thereof. Moreover we have the trustee's knowledge of the

claim of the Government and the litigation, and further, the fact that, down until after the end of the proof period, it was the claim of the Government, against which no limitation ran and which required no proof, and being so, under section 3467, U .S. R.s., the trustee could ignore it only at its peril.

In *re Landis*, 19 Am. B. R. 420, 156 Fed. Rep., 518, the court, McPherson, J. (E. D., Pa.), relying on *Powell vs. Leavitt, supra*, held, "Where in litigation as to property in possession of the bankrupt at adjudication it is determined more than a year thereafter that the transaction by which delivery of the property was made constituted a sale sufficient to pass the title, the defeated claimant may prove for the purchase price as a claim 'liquidated by litigation' within the meaning of section 57 n of the Bankrupt Act."

In *Orcutt vs. Greene*, 204 U. S., 96, it was held that presentation and delivery of proof of claim to the trustee in bankruptcy within a year after the adjudication, for filing with the referee, is a filing within section 57n of the Bankrupt Act as construed in connection with the general order in bankruptcy No. 27.

This case is cited in connection with the statement in the proof of claim, which is admitted in the answer of the trustee, that on July 22, 1908, (which was within one year of adjudication) the Surety Company notified the Guarantee Title and Trust Company, Trustee in Bankruptcy, of the suit brought by the United States for the recovery of this claim and that the defense of the action was tendered to the trustee, which defense it declined to undertake.

In *re Salvator Brewing Co.* (D. C. S. D. New York), 188 Fed., 522, a director of a bankrupt corporation as trustee for himself and other contributing directors unsuccessfully prosecuted his claim to certain security to notes paid by such directors as indorsers, the evidence given in such proceeding amounted substantially to proof of the indorsers claim against the bankrupt's estate; and was sufficient to sustain an amendment made by adding the formal proofs of claim by the directors as general creditors after the expiration of a year from adjudication.

This court has been very liberal in allowing the filing of proofs of claim, where delay has been occasioned by litigation.

Keppel vs. Tiffin Savings Bank, 197 U. S., 356.

There the construction of this section (57 n) of the Bankruptcy Act was not involved directly, but proof was allowed to be filed four and one-half years after adjudication, where the claimant had been defeated in litigation brought to compel a surrender of a preference he had received.

And again in 1909 in *Page vs. Rogers,* 211 U. S., 575, this court held that a creditor compelled by litigation to surrender a preference, might prove his claim, though the adjudication was in 1903, and the case has been appealed twice to the Circuit Court of Appeals.

To the same effect is *In Re John A. Baker Notion Co.,* 180 Fed. Rep., 922.

In re Standard Telephone & Electric Co., 186 Fed., 586; 26 A. B. R., 601, April, 1911 (U. S. Dist. Ct., E.

D. Wis.) is a well considered case. Held that where a referee has determined that a mortgage given by bankrupt is paid under the State law, the litigation to establish its validity carried on by the trustee under such mortgage in appealing from referee's decision is a process of "liquidation" within the meaning of Sec. 57 n of the Bankruptcy Act, so as to authorize the filing by a bondholder of a claim as an unsecured creditor within sixty days after the question has been *finally* determined adversely to the mortgage trustee.

SUBROGATION.

Appellee as Surety having Paid the Debt on a Bond to the Government, Its Claim Is Entitled to the Priority of the Government and the Remedies Necessary to Maintain that Priority.

Admitting for the purpose of the argument that an ordinary claim not having been filed within the proof period would have been too late, yet, under the circumstances of this case, the claim having been originally a debt due to a sovereign, and having been paid by the surety, that sovereign's rights have by operation of law passed to the surety.

Sheldon on Subrogation, 2nd Edition, sec. 86, says:

> "A surety on paying the debt for his principal is subrogated to all the securities, funds, liens and equities which the creditor holds against the principal debtor, or as a means of enforcing payment from him;"

And in section 88 says:

"Accordingly where the government is entitled to priority in the payment of a debt, a surety for the debtor will, upon paying the debt to the government, be subrogated to its priority."

This doctrine of subrogation to the rights and remedies of the sovereign is very old.

Pitman on Principal and Surety, 132, says:

"If, however, the principal is a defaulter to the Crown, and his surety makes good to the Crown the debt due to the defaulting principal, the surety is entitled to stand in the place of the Crown and to have the same remedy that the Crown itself would have had."

We find in the case of *Queen vs. Doughty,* in the reign of Queen Anne, reported in Wightwick 2 n (b), that a surety paying the Crown's debt was ordered to stand in the place of the Crown and to have the aid of the court to recover the whole against the principal in the bond or a moiety against the other surety.

This right to stand in the place of the Crown included all prerogative rights and remedies, and in particular the right to the writ of extent, which writ gave the right, not only to have the debt or the land seized or appraised, but the right to seize and hold the person of the debtor for the debt.

And in the case of *Regina vs. Henry Robinson,* in 1855, recorded in Hurlstone & Norman, 257, Note (a), counsel moved that James Robinson, a surety who had paid the debt of the defendant to the Crown, should be

placed in the situation of the Crown, and that a writ of extent which had issued against the defendant might be put in force in his behalf. An order *nisi* was granted, which was afterwards made absolute.

Nor is this right of subrogation to prerogative rights and remedies of the Crown confined to cases of Crown debtors, such as collectors, receivers, accountants and other fiscal officials and persons bound for certain duties, excise taxes and other civil dues, but was applicable as well to sureties of general debtors to the Crown.

Whitehouse vs. Partridge, 3 Swanston, 365, Court of Exchequer (1818).

Plaintiffs and defendant in that case had received from the Crown a loan of exchequer notes amounting to 5,000 pounds, and given bond on which defendant was surety. The bond being unpaid when due, the Crown had recovered from the surety, and the surety threatened to secure a warrant of extent for the recovery of his debt. On bill to enjoin the securing of the writ, the court clearly recognized the surety's right to use of Crown process to enforce the surety's rights, and directed that plaintiffs either pay money into bank or defendant should have the right to process of extent.

In *Regina vs. Salter*, 1st Hurlstone & Norman, 273, Exchequer (1856), the right of extent was awarded at the instance of a surety who paid the debt of the Crown.

November 21, 1907, was the date of adjudication. Hence the proof period terminated November 21, 1908, at which time judgment had not yet been recovered against the surety. It was still a debt due the sovereign, unneces-

sary to prove, and of which the trustee must take notice, and so continued until December 15, 1908, when the surety by paying and discharging the debt as a matter of equity and by force of section 3468 of the Revised Statutes, became subrogated to the rights of the sovereign creditor.

Section 57 i of the Bankrupt Act provides:

"Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so *in the creditor's name*, and *if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor.*"

The appellant claims that by reason of appellee's failure to avail itself of this section of the Act, that is, to prove its claim as surety, the appellee is precluded from participating in the distribution.

Appellee here invokes the doctrine upon which particular stress is laid in the first section of this argument, viz:

"That no general words in the language of a statute bind the United States, or any other sovereign, and the sovereign is not bound by the provisions of any insolvent law unless specifically mentioned therein."

U. S. vs. Herron, 20 Wall., 251-260;
Dollar Savings Bank vs. U. S., 19 Wall., 239;
U. S. vs. Lewis, 92 U. S., 618.

In Section One of the Bankruptcy Act it is provided:

> "*Creditor* shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy," and
>
> "*Persons* shall include corporations, except where otherwise specified, and officers, partnerships and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden act, and the agents, officers and members of the board of directors, or trustees, or other similar controlling bodies of corporations."

This is purely general language, containing no mention of the government.

In view of these definitions and of the time honored doctrine above outlined, appellee submits that this section—57 i. of the Act—is not applicable to its claim arising as it does under the United States Government; and further because the surety to the Government must sue to recover in his own name and cannot use the name of the United States.

On the Surety's right of subrogation to the prerogative rights of the Government in the enforcement of its claim, we cite further

Orem, Executrix vs. Wrightson, 51 Md., 34;
American Bonding Co. vs. Bank of Baltimore, 97 Md., 598.

In this latter case in an action by the State against the Surety on a bond of a clerk of Court, it was proved

that the Bank where a clerk deposited state funds, had allowed interest on funds and credited it to clerk's private account, and the court held that this was a breach of duty for which surety was liable on bond. The Surety paid the judgment of the State and then filed a bill against the bank to recover this amount. Held, that the Bank so participated in the breach of duty as to make it liable; that the State could have recovered from the Bank, and the Surety was subrogated to its rights.

Held, further, that the Surety, being entitled to all the rights of the State against the Bank, is entitled to the benefit of the exemption of the State from the operation of the statute of limitation.

On page 605 the Court cite with approval *Ghiselin vs. Ferguson*, 4 H. & L., 521, and say:

> "It is said that if a Surety paying the debt of his principal shall be considered to stand in the place of the creditor 'for any one purpose to answer the ends of justice, the court cannot understand why he may not be *so considered for every purpose where the same ends are in view.*'"

The Statute begins to run against the Surety's right to reimbursement or subrogation from the date he pays the principal's debt.

> *Brandt on Suretyship*, Sec. 161, and cases cited.

Sheldon on Subrogation, in Sec. 3, says:

> "It (the doctrine of subrogation) will be applied only in favor of one who has actually performed the obligations of another, and thereby en-

titled himself to the rights and advantages incident to the discharge of such obligations."

The Surety must have paid the debt before subrogation to rights.

Aetna Life Ins. Co. vs. Middleport, 124 U. S., 534;
Prairie State Bank vs. U. S., 164 U. S., 227.

On subrogation to priority rights of United States, see:

In re Kirkland, 2 Hughes (U. S.), 208, 14 N. B. Reg.;
Hunter vs. United States, 5 Peters, 173;
In re McBride, 19 Nat. Bank Reg., 452.

Further, on the right of subrogation to prerogative rights and remedies, the case of *U. S. vs. Preston,* 4 Wash. (C. C.) 446, has been cited by appellant on page 42 of his brief as authority against this right.

That was an action by the United States at the instance of the surety, against the assignees of the principal, the action being subsequently marked to the use of the surety. The questions raised by the record were as stated by the court:

(1) Whether the surety might sue and recover in the District Court, in the name of the United States, with the preference, priority and advantage by law secured to them;

(2) Whether the defendants were entitled to make any equitable defense against the plaintiffs in this action, other than such as might be made against the United States.

The Court decides that the suit was improperly brought in the name of the United States, and did not decide the second point. There is much discussion on "the important advantages * * * claimed for the plaintiff under this section," but *a careful examination will reveal that it is an authority only on the first question raised, and its own facts and is not applicable to the case at bar.*

In *Kerr vs. Hamilton,* 1 Cranch, (C. C.) 546, where a surety had paid the debt due the United States on a duty bond; plea, discharge in bankruptcy; replication, payment by surety of debt due the United States; on demurrer he was denied the right to proceed against the *person* of the bankrupt.

This case is very meagerly reported, the Court merely saying that he had considered the revenue and bankruptcy laws, and that the surety was not entitled to recover.

Section 62 of the Bankruptcy Act of 1800, provided:

> "And be it further enacted that nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them."

In *U. S. vs. Fisher,* 2 Cranch, 358, the 5th Section of the Act of March 3, 1797, giving a preference to the United States in case of insolvency (Section 3466 R. S. being an amplification of said Act), is construed by

Chief Justice Marshall, the question there being the right of priority of the United States in the distribution of the estate of a bankrupt. On page 505, the court say:

"After maturely considering this doubtful statute "(viz Sec. 62 above quoted), "and comparing it with other acts in *pari materia,* it is the opinion of the majority of the court that the preference given to the United States by the 5th section" (of the Act of 1797) "is not confined to revenue officers and persons accountable for public money, but extends to debtors generally.

"Supposing this distinction not to exist, it is contended that this priority of the United States cannot take effect in any case where suit has not been instituted; and in support of this opinion several decisions of the English judges with respect to the prerogative of the crown have been quoted.

"To this argument the express words of the act of congress seem to be opposed. The legislature has declared the time when this priority shall have its commencement; and the court think those words conclusive on the point. The cases certainly show a *bona fide* alienation of property before the right of priority attaches will be good, but that does not affect the present case. From the decisions on this subject a very ingenious argument was drawn by the counsel who made this point. The bankrupt law, he says, does not bind the king because he is not named in it; yet it has been adjudged that the effects of a bankrupt are placed beyond the reach of the king by the assignment made under that law, unless they shall have been previously bound. He argues, that according to the understanding of the legislature, as proved by their acts relative to insolvent debtors, and according to the decisions in

some of the inferior courts, the bankrupt law would not bind the United States although the 62d section had not been inserted. That section, therefore, is only an expression of what would be law without it, and, consequently, is an immaterial section; as the king, though not bound by the bankrupt law, is bound by the assignment made under it; so, he contended, that the United States, though not bound by the law, are bound by the assignment.

"But the assignment is made under and by the direction of the law, and a proviso that nothing contained in the law shall affect the right of preference claimed by the United States, is equivalent to a proviso that the assignment shall not affect the right of preference claimed by the United States."

United States vs. Hooe et al., 3 Cranch, 73, cited by appellant, is a case which recognizes the priority rights of the United States under the Act of 1797, though not involved in the distribution of an insolvent or bankrupt estate, and holds that such priority, however, does not create a lien upon the real estate.

IN CONCLUSION

It seems to counsel for appellee that this argument cannot be closed to better advantage than by reference to the fact that the proof period of one year, as prescribed by the Act, expired on November 21st, 1908, that in the litigation judgment was not entered against the surety until November 30th, 1908, which said judgment was paid and satisfied by the surety on December 15th, 1908. Then on December 26th, an order of distribution was made by the referee, in which no mention was made of the claim of the United States or its surety, which distribution we may safely assume was made without any

knowledge of the fact that the debt of the United States had been paid by the surety. In point of fact there is absolutely no reference whatever, either in the schedules or any other part of the record, prior to presentation of claimant's petition after distribution was made, to this debt due the United States, though as admitted by the trustee in its answer to claimant's petition, the trustee had knowledge of the claim in litigation.

We have here then a case where, under the statutes and the decisions, the trustee was liable for the claim of the Government for almost a month after the termination of the proof period, and for which, under section 3467 R. S., quoted below, it would still be liable if unpaid, even in the face of the decree of distribution, so rigorous is the law in enforcing the rights of the government to priority of payment of its claim against insolvent estates.

U. S. vs. Barnes, 34 Fed. Rep. 705,
Field vs. U. S., 9 Peters, 182. Marshall, C. J.

Section 3467 of the Revised Statutes provides:

"Every executor, administrator or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts before he satisfies and pays the debt due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

In *United States vs. Barnes, supra*, the defendant, as an assignee in bankruptcy under the Act of 1867, with knowledge of the indebtedness of the bankrupt to the United States (as in the case at bar) in the sum of

over $99,000, had in accordance with the decree of the register in bankruptcy, distributed and paid the sum of over $32,000 to creditors of the bankrupt other than the United States. It appeared at the trial that the United States did not intervene in the bankruptcy proceedings or take any steps to establish their claim until a time subsequent to the distribution of the $32,000. The claim of the United States was not reduced to judgment until April 19, 1872, whereas the distribution had been made on the 12th day of the preceding September.

The action against Barnes was brought to recover out of his own personal estate the amount so improperly distributed. He pleaded the decree of distribution.

Held that in such case "the assignee becomes a trustee for the United States, and when he has notice of the debt due the government he cannot escape personal liability for the amount of it to the extent of the value of the assets coming to his hands, if he fails to provide for it before making distribution to other creditors."

The Court, on page 707, say:

> "Such is the rigor of the statute that he cannot invoke the judgment of a court of competent jurisdiction directing him to deliver the assets to specified creditors as a justification, when it does not appear that the United States were a party to the proceeding, or that he took proper measures to secure the priority of the United States in the distribution."
>
> Citing *Field vs. U. S., supra.*

In this latter case the assignees of an insolvent creditor had, under the order of the parish court in the

State of Louisiana, paid certain creditors, with knowledge of the existence of the debts due to the United States.

The Court, Marshall, C. J., says, on page 201:

"The United States were, it is true, not parties to the proceedings in the parish court, nor were they bound to appear and become parties therein. The local laws of the state could not create a priority in favor of other creditors in cases of insolvency which would supersede that of the United States. The priority of the latter attached by the laws of the United States in virtue of the assignment and notice to the syndics (assignees) of their debts, *and it was the duty of the syndics to have made known those debts in the tableau of distribution as having such priority.*"

The appellee, by way of a brief review, calls the Court's attention to:

FIRST. That the right of the government to have its claim paid first out of any insolvent estate is clear in the light of

(a) Section 3466 of the Revised Statutes above quoted.

(b) The fact that the Bankrupt Act of 1898 makes no reference whatever to debts due the government, and in this connection we call the Court's attention to the language of Justice Swayne in *Lewis vs. U. S., supra,* wherein he, in effect, says that the language of the Act of 1867, specifically providing for priority of the debts of the United States, was merely declarative of the exist-

ing law and inserted in order to avoid any other possible conclusion.

(c) The time-honored doctrine, as declared both by the courts of England and of this country, that the sovereign is not affected by any insolvent law unless specifically mentioned therein, nor by any general words of a statute, such as "creditor," "person," etc.

SECOND. On the question of liquidation by litigation, nothing more can be said than to call the Court's attention to the language of a number of cases above cited and quoted calling for a liberal construction of paragraph 57 n of the Act, to the effect, as stated in *Hutchinson vs. Otis, supra,* (C. C. A. First Circuit), affirmed by this court in 190 U. S., 552, that such a statute is to be construed as are all remedial statutes; that is, that claims "liquidated by litigation" reaches every case in which a question arises and which comes into a judicial tribunal within the year limited if the question in any manner involves the determination of the net amount for which the claim shall be finally filed, and in this connection we call the Court's attention to the litigation in this cause, the uncertainty as to the exact amount which would be recovered and the costs, and the fact that the surety's payment of a debt excepting under compulsion is always dangerous; that the trustee (appellant here) had knowledge of this litigation, was tendered and refused its defense.

THIRD. On the right of subrogation, generally, and in particular to the prerogative rights of the government, we invite the Court's careful consideration of the ancient cases above cited allowing such subrogation in England and those of later times in this country; and

where such subrogation to prerogative rights has been denied in this country, an examination of the cases will reveal that: (a) that they have been decided in construing acts other than insolvent or bankrupt laws, or (b) that they all have peculiar circumstances which move the court to such action, some of these cases having been mistakenly cited for authorities along certain lines when they are not such in fact.

We invite the Court's attention to the fact of the continued liability of the trustee for the payment of the government's claim, not only as a trustee but out of its own effects for almost a month after the termination of the proof period of one year.

If the Court decides, under Section 3466, that the priority of the Government still exists as contended by the appellant, it follows that the trustee was liable therefor out of the estate of the insolvent, and under Section 3467 "in his own person and estate" down to the date of payment by the surety, which was after the termination of the proof period. How then, under section 3468, and the decisions can it be said that upon the payment of the Government claim by the surety, the claim is utterly wiped out and the principal and its estate relieved from all liability?

It is respectfully submitted, that this case rests upon the application of these three sections of the Revised Statutes, and that the sections of the Bankruptcy Act invoked by the appellant are really aside from the question.

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GUARANTEE TITLE & TRUST COMPANY, TRUSTEE OF PITTSBURGH INDUSTRIAL IRON WORKS, BANKRUPT, *v.* TITLE GUARANTY & SURETY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 188. Argued March 5, 1912.—Decided April 1, 1912.

Under the general rule applicable to all sovereigns, the United States is not bound by the provisions of an insolvency law unless specially mentioned therein.

The Bankruptcy Act of 1867 and the act of March 3, 1797, 1 Stat. 515, c. 20, now §§ 3467, 3468, 3469, Rev. Stat., by both of which all debts due the United States are given priority over all claims, were *in pari materia*, and the Bankruptcy Act of 1867 affirmed the act of 1797. *Lewis* v. *United States*, 92 U. S. 618.

The Bankruptcy Act of 1898 was not an affirmation of the act of 1797 or of Rev. Stat., § 3467, 3468, 3469, and the change of provisions in regard to priority indicates a change of purpose in that respect.

Under a beneficent policy, which favors those working for their daily bread and does not seriously affect the sovereign, Congress, in enacting the Bankruptcy Law of 1898, preferred labor claims and gave them priority over all other claims except taxes, and the courts must assume a change of purpose in the change of order.

In this case *held* that even if a surety company which had paid the debt of the principal to the Government was subrogated to the claim of the Government and was entitled to whatever priority the Government was entitled to, under the Bankruptcy Act of 1898, the claim not being for taxes but a mere debt was not entitled to priority in distribution of the bankrupt's assets over claims for labor preferred by the act.

174 Fed. Rep. 385, 98 C. C. A. 603, reversed.

THE facts, which involve the construction of the Bankruptcy Act of 1898 in regard to priority of claims of the United States against the bankrupt, are stated in the opinion.

Mr. R. T. M. McCready for appellant.

Mr. George J. Shaffer, with whom *Mr. Walter Lyon* and *Mr. John P. Hunter* were on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves the consideration of the priority of payment out of the estate of a bankrupt of claims due the United States and claims for labor.

The United States is not a party to the action, but appellee brings itself into relation with it as subrogated to its rights by the payment of a judgment obtained against the appellee, as surety on a bond for the bankrupt. We shall assume that appellee may assert whatever priority the United States possessed.

After the payment of the judgment appellee petitioned the District Court having jurisdiction of the bankruptcy proceedings for an order directing the Trustee in Bankruptcy to pay it the amount of the judgment before making any other distribution of the funds of the bankrupt. The Referee in Bankruptcy decided against the priority,

and also decided that the claim had not been presented in time for allowance. Upon petition for review and the questions having been certified to the District Court, the report of the Referee was confirmed. This action was reversed by the Court of Appeals, and the appellee awarded priority.

The priority of the United States is established, it is contended, by §§ 3466, 3467 and 3468 of the Revised Statutes, which are, respectively, as follows:

Section 3466. "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3467. "Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

Section 3468. "Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which came to the hands of his executor, administrator or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays

to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon."

The counter contention of appellant is that those sections have been superseded by the provisions of the Bankruptcy Act of 1898, which declare a different policy and give priority to labor claims. Those provisions we shall presently quote and consider.

The comprehensive objection is made to the applicability of the provisions that the United States as a sovereign is not bound by the general language of a statute, and is not bound by the provision of an insolvency law, unless specifically mentioned therein. This objection prevailed in the Circuit Court of Appeals, and is said to be sustained by *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239; *United States* v. *Herron*, 20 Wall. 251, 260; *Lewis, Trustee*, v. *United States*, 92 U. S. 618.

The proposition is established. The first case cited gives an illustration of it not connected with bankruptcy laws. In the other two cases it was applied to such laws.

United States v. *Herron* was an action brought on a bond executed by one Collins as principal and Herron and others as sureties. Herron pleaded a discharge in bankruptcy under the act of 1867 (March 2, 1867, 14 Stat. 530, c. 176). The question was therefore presented whether a discharge under the act barred a debt due to the United States. It was held that such a discharge was not a bar, although it was also held that the United States might have proved its debt and been given priority by the act.

The decision was expressly put upon the ground "that

the sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign." There was much reasoning to sustain the proposition, and it was especially applied to discharges in bankruptcy. Expressing the general assent to the proposition announced, the court said (p. 262):

"Greater unanimity of decision in the courts or of views among text writers can hardly be found upon any important question than exists in respect to this question in the parent country, nor is there any diversity of sentiment in our courts, Federal or State, nor among the text writers of this country."

In *Lewis, Trustee*, v. *United States*, Lewis had been appointed trustee of the estates of Jay Cooke & Company, and as such received and held their separate individual estates and assets, and the estates and assets of the firm as well. The estates of the bankrupts were insufficient to pay all their indebtedness. The United States claimed priority of payment of its debt out of the individual estates as against the creditors of the firm. Lewis denied the validity of the demand, but it was sustained.

As one of the elements in its decision the court considered the provision of the act of 1867 (§ 5101 of the Revised Statutes) that in the order for a dividend "all debts due to the United States, and all taxes and assessments under the laws thereof," should be "entitled to priority and preference." The court also considered as an element of its decision the act of March 3, 1797 (1 Stat. 512, 515, c. 20), which provided as follows:

"That where any revenue officer or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States

shall be first satisfied, and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor shall be attached by process of law, as to the cases in which a legal act of bankruptcy shall be committed."

The court decided that it was "almost too clear to admit of serious controversy" that under this act and the facts in the case the United States was entitled to the priority which they claimed, and passed to the contention against it based on the provisions of the Bankruptcy Act.

The court met the contention by the general declaration that "the United States are in no wise bound by the Bankruptcy Act." The disposing effect of the declaration was appreciated, for it was said "that the claim of the United States was not proved in the bankruptcy proceedings in question was, therefore, quite immaterial." Citing *United States* v. *Herron*, *supra*, and *Harrison* v. *Sterry*, 5 Cranch, 289.

The court, however, did consider the provisions of the Bankruptcy Act and said of the clause which it had quoted that it was "*in pari materia* with the several acts giving priority of payment to the United States, and was doubtless put in to recognize and reaffirm the rights which those statutes give and to exclude the possibility of a different conclusion." And, emphasizing the priority of the United States, it was pointed out (p. 623) that the Bankruptcy Law declared that the United States should be first paid and that the act of 1867 gave the debts of the United States priority. "Neither statute," the court said (p. 623), "contains any qualification, and we can interpolate none." The inference from the language of the court, it must be admitted, is quite strong, and the Court of Appeals considered that "in the light thereof the

omission in the Act of 1898 of words expressly giving priority to debts due to the United States had no more significance than the presence of such words in the Act of 1867"—that is, as we understand the reasoning, that § 3466 of the Revised Statutes, which is a reproduction of the statute of 1797, with immaterial changes, was all-sufficient to give priority and that the rights it gave were only recognized and reaffirmed by the provisions for priority in the Bankruptcy Act of 1898. But, as we have seen, the decision in *Lewis* v. *United States* declared that the statute of 1797 and the Bankruptcy Act were to be regarded as *in pari materia*, and both were unqualified; or, as the court said, as neither contained any qualification, none could be interpolated. They being affirmations of each other, either would have been sufficient without the other. The Bankruptcy Act of 1867, as we have seen, provided for priority, first, for the payment of expenses, and, second, of "all debts due to the United States, and all taxes and assessments under the laws thereof." The priority, therefore, given by the Bankruptcy Act was coextensive with the priority given by the statute of 1797. In other words, to repeat, there was a reaffirmation by the Bankruptcy Act of the statute of 1797. But there is not such affirmation by the Bankruptcy Act of 1898 of that statute, which still exists, as we have said, as § 3466 of the Revised Statutes, *supra*. There is a change in provisions, and we come to the question if there is a change of purpose. A consideration of those provisions becomes necessary. We shall quote those only which affect the United States. They are as follows: "Section 1. . . . (9) 'Creditor' shall include any one who owns a demand provable in bankruptcy." (Sec. 17.) A discharge in bankruptcy releases the bankrupt from all of his provable debts except such as are due as a tax levied by the United States. (Sec. 57–J.) Debts owing to the United States as a penalty or forfeiture shall not be allowed except for the

amount of the pecuniary loss sustained by the act, transaction or proceeding out of which the penalty arose.

Priority is provided for in § 64 as follows: "(a) The court shall order the trustee to pay all taxes legally due the United States. (b) Debts to have priority, except as herein provided, and to be paid in full, . . . and the order of payment shall be: (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of the proceedings; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority."

With these provisions we may compare §§ 5091 and 5101 of the Revised Statutes, which are reproductions of the act of 1867. Section 5091 provided that creditors whose debts were duly proved and allowed should be entitled to share *pro rata* without any priority or preference except as allowed in § 5101. The latter section (5101) provided as follows:

"In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full in the following order:

". . . Second. All debts due to the United States, and all taxes and assessments under the laws thereof. . . . Fourth. Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy. Fifth. All debts due to any person who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this Title had not been adopted. . . ."

It will be seen, therefore, that by the statute of 1797 (now § 3466) and § 5101 of the Revised Statutes all debts due to the United States were expressly given priority to the wages due any operative, clerk or house servant. A

different order is prescribed by the act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in *full*. The only exception is "taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality." These were civil obligations, not personal conventions, and preference was given to them, but as to debts we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants.

Reversed.